Pepsi Cola Bottling Company, Inc. of Norton *and* Teamsters Local Union No. 549, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO *and* Ernest E. Delph. Cases 5–CA–17875, 5–CA–17992, 5–CA–18028, 5–CA–18079, 5–CA–18210, 5–CA–18250, 5–CA–18284, 5–CA–18294, 5–CA–18582, 5–CA–18641, and 5–CA–18917

February 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On June 7, 1990, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pepsi Cola Bottling Company, Inc. of Norton, Norton, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer Bobby Boyd, Johnny Waddell, Larry Blanken, Francisco Vega, Sam Sanders, and Ernest E. Delph immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole with interest for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.''

2. Substitute the following for paragraph 2(b).

''(b) Make whole with interest Bobby Boyd, Terry Henderson, Carlos Fields, Kenneth Allen, Robert Falin, Francisco Vega, Richard Shular, Bobby Blanken, Ronald Blanken, Kenneth Blanken, Sam Sanders, and Ernest E. Delph for any loss of pay they may have suffered as a result of the discriminatory reductions in their work hours, suspensions, or layoffs, in the manner set forth in the remedy section of the decision.''

3. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted only to some of the judge's findings regarding employees Bobby Boyd, Johnny Waddell, Larry Blanken, Francisco Vega, Sam Sanders, and Ernest E. Delph.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the statement in par. 20, sec. C, 8,b, of the judge's decision that ''the Company made no showing that it had disciplined any employee for negligence in the operation of a forklift.'' Nor do we endorse any implication in that paragraph that the Respondent might be required to prove that another employee was disciplined for conduct identical to Larry Blanken's. We agree, however, with the judge that the Respondent has failed to rebut the General Counsel's prima facie case. The Respondent has not shown a practice of similar discipline for comparable conduct; i.e., there is no showing that any other employee was suspended or discharged for negligent operation of a forklift. Much of the evidence proffered by the Respondent related to incidents that involved discipline of other union supporters or that occurred after Blanken's discriminatory discipline. And some of those incidents involved seemingly more serious mishaps, but resulted in less severe discipline than that meted out to Blanken.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(4) and (1) of the Act by discharging employee Delph, we do not rely on the judge's conclusion concerning what might be a ''reasonable approach'' to the problem for which Delph was ostensibly discharged. We find, instead, that the General Counsel presented a prima facie case that Delph's testimony in a Board proceeding was a motivating factor in the discharge and that the Respondent did not show, by a preponderance of the evidence, that even in the absence of that testimony, the Respondent's general manager would have inflexibly applied the hygiene rules so as to mandate Delph's discharge.

Further, in regard to the judge's finding that the Respondent's discharge of employee Delph violated Sec. 8(a)(4) and (1) of the Act, Member Oviatt notes that Delph was allegedly discharged for violating the plant's hygiene policy at a time when Delph was not working in the plant. On the morning of May 21, 1987, after being off work because of an injury, Delph reported to the Respondent's facility with a doctor's note to seek reinstatement. At that time, he was discharged for violating the Respondent's ''hygiene standards.'' Thus, at the time of discharge, Delph was not ''on the clock'' and had not been reinstated, yet he was charged with violating a plant policy. In Member Oviatt's view, this fact lends support to the judge's finding that the Respondent seized on Delph's hygiene problem as a pretext for discharging Delph.

[2] We have modified the judge's recommended Order and substituted a new notice to conform to the judge's Conclusions of Law.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue warnings, written or verbal, discharge, suspend, lay off, reduce existing work hours, or otherwise discriminate against any employee for actively assisting or supporting Teamsters Local Union No. 549, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other union.

WE WILL NOT issue written warnings, discharge, suspend, lay off, otherwise reduce work hours, or issue warnings, or otherwise discriminate against employees because they appear and give testimony at a National Labor Relations Board hearing.

WE WILL NOT threaten employees with a production shutdown, plant closure, discharge, acts of physical violence or other specified or unspecified reprisals because they signed authorization cards for, are members of, handbill for, or otherwise assist or support, Teamsters Local 549 or any other union.

WE WILL NOT coercively interrogate employees regarding their union activities, membership, or sympathies.

WE WILL NOT engage in surveillance of our employees' union activities using television cameras, monitor devices, or any other means.

WE WILL NOT create the impression that our employees' union activities are and other concerted activities are under our surveillance.

WE WILL NOT promulgate rules concerning our employees' right to wear uniforms or to curtail their union activity.

WE WILL NOT discipline employees for discussing their employment status, or their wages, hours, and conditions of employment, or the possible advantages of collective bargaining and union representation.

WE WILL NOT require employees to remove from their clothing, insignia pertaining to Teamsters Local 549 or to any other union.

WE WILL NOT tell employees that they are disloyal if they support Teamsters Local 549 or any other union.

WE WILL NOT solicit employees to revoke their signed union authorization cards supporting Teamsters Local 549 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Bobby Boyd, Johnny Waddell, Larry Blanken, Francisco Vega, Sam Sanders, and Ernest E. Delph immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole with interest for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole with interest Bobby Boyd, Terry Henderson, Carlos Fields, Kenneth Allen, Robert Falin, Francisco Vega, Richard Shular, Bobby Blanken, Ronald Blanken, Kenneth Blanken, Sam Sanders, and Ernest E. Delph for any loss of pay they may have suffered as result of the discriminatory reduction in their work hours, suspensions, or layoffs.

WE WILL remove from our files any reference to the unlawful discharges, suspensions, and warnings, verbal or written, and notify the employees in writing that this has been done and that the discharges, suspensions, and warnings will not be used against them in any way.

PEPSI COLA BOTTLING COMPANY, INC. OF NORTON

Thomas M. Lucas, Steven E. Nail, and *Paula S. Schaefler, Esqs.*, for the General Counsel.
Mark M. Lawson and *Kurt J. Pomrenke, Esqs. (White, Elliott & Bundy),* of Bristol, Virginia, for the Respondent.
Charles Moore, International Representative, of Blountville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Big Stone Gap, Norton, and Coeburn, Virginia, on November 4–7, 11, 12, 13, 18, 19, and 20, December 9, 10, 11, 12, 16, and 17, 1986, and on January 6, 7, 8, and 9, March 24 and 25, and September 30, 1987. On December 21, 1987, upon the parties' motion, I ordered the record reopened to receive Joint Exhibit 1, which is captioned, ''Unofficial Merger of Third Consolidated Complaint, Amendment Granted at Trial and Consolidated Complaints.''

Upon a charge filed by the Union, Teamsters Local Union No. 549, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, on February 28, 1986,[1] and two amended charges, the Acting Regional Director for Region 5 issued a complaint on May 19, alleging that Respondent, Pepsi Cola Bottling Company, Inc. of Norton (the Company), had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with a 2-week production shutdown, by interrogating employees, threatening them with unspecified reprisals, creating an impression among its employees that their union activities were under surveillance, telling employees that they were disloyal if they supported the Union, soliciting its employees to revoke their union cards, installing television cameras and monitor recorders to engage in surveillance of its employees' union activities, and by issuing an oral warning to an employee. The complaint also alleged that the Company violated Section 8(a)(3) and (1) of the Act by issuing written warnings, suspending, discharging, and laying off employees because they supported or assisted the Union.

Upon the Union's further charges and amended charges, filed on and after April 14, the Acting Regional Director and

[1] Unless otherwise stated, all dates occurred in 1986.

the Regional Director for Region 5, respectively, issued amended consolidated complaints alleging that the Company had engaged in further violations of Section 8(a)(1) and (3) of the Act. In addition, upon the Union's charges and amended charges in Cases 5–CA–18582 and 5–CA–18641, the Regional Director issued a consolidated complaint on March 10, 1987, which included allegations that the Company suspended, discharged, laid off and disciplined employees because they testified at the unfair labor practice hearings before me in Cases 5–CA–17875, 5–CA–17992, 5–CA–18028, 5–CA–18079, 5–CA–18210, 5–CA–18250, 5–CA–18284, and 5–CA–18294.

Finally, upon a charge filed by Ernest E. Delph, an individual, on June 5, 1987, in Case 5–CA–18917, the Regional Director issued a complaint on July 28, 1987. This complaint alleged that the Company had violated Section 8(a)(4), (3), and (1) of the Act, by discharging Delph. The Company, by its answers to the complaints, denied committing the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[2] filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Virginia corporation, with a plant and warehouse at Norton, Virginia, and distribution centers at Maxwell, Virginia; Tazewell County, Kene Mountain, Virginia; Loyall, Kentucky; and Bristol, Tennessee, is engaged in the manufacture, sale, and distribution of bottled and canned soft drinks. In the course and conduct of its business, the Company annually purchases and receives at its Norton, Virginia facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Virginia. In addition, the Company annually sells and ships from its Norton, Virginia facility products valued in excess of $50,000 directly to points outside the State of Virginia. The Company admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Company admitted, and I find, that Teamsters Local Union No. 549, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

The Union began an organizing campaign among the Company's employees in December 1985, when International Representative Charles Moore met with Johnny Waddell, his son David, and two other company employees. Moore resumed his organizing effort on February 16, when he held a meeting at a restaurant with 50 to 55 employees. Nineteen employees agreed to join an organizing committee. Two days later, Moore attempted, unsuccessfully, to deliver a letter to the Company's president, George Hunnicutt Sr., announcing the organizing campaign and listing the 19 employees on the organizing committee. The Union mailed a copy of that same letter, which the Company received on February 21. On the following day, George Hunnicutt Sr., in a letter to the employees and their families, announced receipt of the Union's letter, listed the 19 employees on the organizing committee, and expressed the Company's opposition to the campaign's objective.

Moore conducted a second organizing meeting with company employees on February 23. By letter dated February 25, and received by the Company 3 days later, the Union provided the names of 22 more employees who had agreed to assist the Union's campaign. Following this meeting, employees began handbilling in front of the Company's Norton facility.

The Union pursued its organizing campaign in March. It held more meetings and enlisted the assistance of five more company employees. By letters dated March 6 and 20, respectively, the Union provided the Company with these additional names.

The Union's organizing effort did not achieve its goal. A petition for a representation election resulted in a hearing in March. However, the record does not show that an election occurred, or that the Union otherwise sought recognition as the collective-bargaining representative of the Company's employees.

The issues presented in these cases are whether a preponderance of the testimony shows that the Company during and after the Union's organizing effort violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees regarding their union membership, union activities or sentiment toward the Union;

(b) Threatening its employees with reprisals because of their union membership, union activities or support for the Union;

(c) Creating the impression among its employees that their union activities were under its surveillance;

(d) Telling employees that they were disloyal because they supported the Union;

(e) Soliciting employees to revoke their union authorization cards;

(f) Installing television cameras and monitor recorders to engage in surveillance of its employees' union activities;

(g) Threatening employees with discharge because they distributed union badges to other employees;

(h) Promulgating a new rule concerning the wearing of uniforms for the purpose of curtailing its employees' union activity;

(i) Threatening employees with discharge because they were handbilling on behalf of the Union while in its uniform;

(j) Threatening employees with discharge because they were engaged in union activity;

[2] At various points in its brief, the Respondent has moved to correct the transcript in certain respects. Having read the transcript and considered the Respondent's proffered corrections, I find them warranted, and grant the motions to correct.

(k) Threatening employees with physical violence and discharge because of their union membership, union activity or sentiment toward the Union;

(l) Coercively asking employees whether they had signed cards for the Union;

(m) Threatening employees with discharge if they signed cards for the Union;

(n) Disciplining an employee because of his union activity, or other concerted activity protected by Section 7 of the Act,[3] and by:

(o) Ordering employees to remove union insignia from their outer garments.

Section 8(a)(3)[4] and (1) of the Act by:

(a) Issuing written warnings to employees Larry Blanken, John Horne, Bobbie Blanken, Sam Sanders, Francisco Vega, and Bobby Boyd;

(b) Reducing the hours worked by mechanics Bobbie Blanken, Ronnie Blanken, Kenneth Blanken, Richard Shuler, and Gary Sturgill;

(c) Suspending employees Ernest E. Delph, Francis Vega, Robert Falin, Terry Henderson, and Kenneth Allen;

(d) Discharging employees Terry Henderson, Francisco Vega, Bobby Boyd, Jeff Ritchie, and John Horne;

(e) Laying off employee Carlos Fields;

(f) Changing the working hours and shifts of employees Bobby Boyd and Johnny Waddell;

(g) Constructively discharging employee Johnny Waddell, and;

(h) Issuing an oral warning to employee Robert Falin.

and Section 8(a)(4), (3),[5] and (1) of the Act, by;

(a) Suspending employees Ernest E. Delph and Sam Sanders;

(b) Issuing written warnings to employees Ernest E. Delph and Sam Sanders;

(c) Laying off employees Ernest E. Delph and Sam Sanders, and;

(d) Discharging employees Ernest E. Delph and Sam Sanders.

B. *Interference, Restraint, and Coercion*

On Monday, February 17, Assistant Operations Manager Robbie Mullins approached employee John C. Baker at the Company's Norton, Virginia facility and began questioning him. Mullins asked Baker if he had attended the meeting. Baker, who had in fact attended the Union's meeting on the previous day, asked, ''What meeting?'' Mullins responded: ''You know what meeting, that union meeting.'' Baker persisted in claiming he didn't know what Mullins was talking about. At this, Mullins concluded the exchange with a few comments, including his assertion that he knew that Baker had signed.[6]

In determining whether Mullins' questioning of Baker violated Section 8(a)(1) of the Act, as alleged, I have looked to the teachings of *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1007–1009 (9th Cir. 1985). In that case, the Board stated that the test for evaluating the coercive impact of interrogation requires consideration of all the surrounding circumstances.

Here, a supervisor singled out Baker, during worktime, on company property, and repeatedly pressed him to admit that he had attended a union meeting. However, the employee adamantly refused to admit that he had in fact gone to the meeting. At this, the supervisor made remarks which strongly suggested that he knew that Baker had attended the meeting and had signed a union authorization card. Absent was any showing that Mullins' inquiry had any valid purpose or that he had assured Baker against reprisal at the Company's hands.

The manner in which Mullins phrased his questions and his assertion that he knew that Baker had ''signed,'' provided a coercive overtone to the incident. For they suggested that Baker's union activity on the previous day had been under surveillance. Upon considering this coercive overtone and the Company's union animus, as shown by its subsequent unfair labor practices, found elsewhere in this decision, I find that Mullins' interrogation of Baker violated Section 8(a)(1) of the Act. *Gerkin Co.*, 279 NLRB 1012 fn. 3 (1986).

On February 18, the Union sent a notice to the Company that employee John C. Baker, among others, was a member of the Union's organizing committee and was assisting in the organizing campaign. The Company received the notice shortly thereafter, and on Fehruary 22, issued a letter to its employees, announcing its opposition to the Union, and listing the employees on the organizing committee, including Baker.

On March 4, Baker came to work at the Company's Norton plant in the same automobile with employees Bobby Boardwell and Michael Stallard. The three employees were scheduled to begin work at 3 p.m. They arrived about 2 p.m., went to the breakroom and began drinking coffee.

Shortly before the beginning of their shift, Operation Manager Roy Almaroad came into the breakroom and told Baker, Stallard, and Boardwell to clock in. One of the employees told Almaroad that they were finishing their coffee and wanted to wait. Almaroad left the breakroom.

Almaroad returned shortly, instructed Stallard to clock in, and took him to the bottling line. As Stallard began working, Almaroad told him to ''watch about running around with John Baker,'' Almaroad also warned, in substance, that asso-

[3] Sec. 7 provides in pertinent part:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
Sec. 8(a)(1) of the Act provides:
It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

[4] Sec. 8(a)(3) of the Act provides in pertinent part:
It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[5] Sec. 8(a)(4) of the Act provides:
It shall he an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

[6] I based my findings regarding Mullins' interrogation of Baker upon the latter's full and forthright testimony. Mullins denied discussing union activity with Baker in 1986. However, neither Mullins nor any other witness disputed Baker's account.

ciation with Baker would get Stallard into ''trouble'' and ''lead [him] down a dim road.''

By telling employee Stallard to stay away from John Baker, a known union supporter, and warning of trouble and a dim dark road as the alternative, Almaroad was attempting to coerce Stallard into refraining from union activity in league with Baker. Almaroad's warning carried the implied threat of economic reprisal against Stallard if he defied the warning. I find that by Almaroad's warning regarding association with John Baker, the Company violated Section 8(a)(1) of the Act. *Tennessee Cartage Co*., 250 NLRB 112, 117, 120 (1980).

On February 16, the Union held a meeting in Norton, Virginia, with 50 to 55 employees. On or about February 17, Robbie Mullins came to employee Ernie Delph's workstation at the Company's Norton plant and asked him how the union meeting had gone. Delph replied that he didn't know and that he had not been there. Mullins rejected Delph's response, insisting that Delph knew that he had been at the meeting.[7]

The considerations which persuaded me that Mullins' interrogation of Baker was unlawful have led me to the same finding here. Accordingly, I find that Mullins' questioning of Delph regarding his attendance at a union meeting violated Section 8(a)(1) of the Act.

Employee Robert Falin signed an authorization card for the Union in January or February. The Union named him as a member of the organizing committee in its letter to the Company dated February 18. I find that on or about February 20, Supervisor Robbie Mullins asked Falin if he had signed a union card. At the time of the questioning, Falin was working at the Company's Norton plant. Falin began his answer, saying that he liked Mullins as a friend. He added: ''[B]ut what you asked me is a Federal offense.'' Mullins walked away without further comment.[8]

I have determined the coerciveness of Robbie Mullins' question in accordance with Board policy. Thus, I have considered all the surrounding circumstances, including Falin's open and active support for the Union, the locus of the questioning, the absence of any assurance against reprisal, and the supervisor's failure to provide Falin with any valid reason for asking him if he had signed a union card. An important factor in my assessment was the evidence of union animus as reflected by the Company's subsequent unfair labor practices. I noted the Company's threats of economic reprisals, its unlawful discharges, and other discriminatory treatment of union supporters. I find that, on balance, the surrounding circumstances rendered Mullins' question impermissibly coercive. See *Rossmore House*, 269 NLRB at 1177–1178 fn. 20.

That Falin considered Mullins to be his friend was not decisive in my review of the circumstances surrounding this incident. The Board has recognized that a social or personal relationship between the supervisor and an employee is only one of the factors to be weighed in determining whether such interrogation is unlawful. *Isaacson-Carrico Mfg. Co*., 200 NLRB 788 (1972). Here, I find from Falin's testimony that Mullins was direct and did not couch his question in terms indicating that he had any special regard for Falin. This was not a friendly conversation. In sum, I find that Mullins' interrogation of Falin was coercive conduct violative of Section 8(a)(1) of the Act.

Soon after the union activity began, Dale Kennedy, the Company's brand manager for Seven-Up and Dr. Pepper, a supervisor, approached employee Samuel Stapleton and stated:[9]

> Those boys are trying to get the union in. George is going to fix them. He's going to shut the bottling line down for two weeks.''

Kennedy's remarks came in the wake of the Company's announcement on February 18, in a notice posted at the Norton plant, that it would shut down its three production lines on February 26 or 27. Stapleton admitted seeing notice of a plant shutdown close in time to Kennedy's quoted remarks. The Company's notice attributed the shutdown only to economic considerations. An employee listening to Kennedy's warning was likely to credit the supervisor with special knowledge because of his position in the Company's management, and thus discount the economic reasons given in the notice.

There are two George Hunnicutt's mentioned in the transcript. George E. Hunnicutt Sr. is the Company's president. His son, George E. Hunnicutt Jr., is the Company's executive vice president and general manager. The record shows that the Company's management and its employees referred to George Sr. as ''George'' and that they commonly referred to George Jr. as ''Pedro.''

At the time Dale Kennedy made the quoted statement to employee Stapleton, both of them knew that ''George'' referred to George E. Hunnicutt Sr. Therefore, Stapleton understood that Kennedy was warning that George E. Hunnicutt Sr. would shut production down in retaliation for the union organizing effort among the Company's employees.

Dale Kennedy's warning constituted a threat of economic reprisal attributable to the Company. I also find that this threat tended to restrain, coerce, and interfere with employees engaged in union activity protected by Section 7 of the Act. Accordingly, I find that Kennedy's warning violated Section 8(a)(1) of the Act.

On February 18, quality control employee Vivian K. Rasnake signed a card for the Union. On the following day,

[7] Mullins denied having any conversations with Delph during 1986 about any union activity. However, Mullins did not deny questioning Delph about a union meeting. Counsel for the Company did not examine Mullins on the topic. Nor did counsel for the General Counsel.

In contrast to Mullins, Delph provided a reasonably detailed recollection of the alleged interrogation, in a straightforward manner. Therefore, I have credited Delph's testimony in this regard.

[8] I based my findings regarding Mullins' alleged interrogation of Falin upon the latter's testimony. On direct examination, Mullins answered ''No'' when asked if he ever had any discussions with Falin about union activity. However, Mullins did not deny interrogating Falin about signing a union authorization card. Moreover, while testifying about this incident, Falin appeared to be giving his recollection in full. Accordingly, I rejected Mullins' denial and credited Falin's account.

[9] I based my findings of fact regarding Dale Kennedy's remarks upon Stapleton's candid and consistent testimony. In rejecting Kennedy's denial, I noted that company counsel, in preparing him for the hearing, had compromised the sequestration of witnesses by revealing that Stapleton had testified, accusing Kennedy of threatening a plant shutdown. I also noted Kennedy's attempt before me to bolster his denial by spontaneously and vehemently stating: ''I'm surprised Mr. Stapleton would say something like that. He's a liar.'' Kennedy also detracted from his credibility by punctuating his denial with gratuitous assertions that ''I'm not an owner down there. I wouldn't even know about anything like that.'' In sum, Kennedy did not persuade me that he was a frank witness.

as she walked through the Company's Norton plant, toward her workstation, she approached the Company's operations manager, Roy Almaroad. Almaroad, who was seated near the production line, asked Rasnake to sit with him. He looked at Rasnake and asked: ''How much have you had to do with all of this?'' Rasnake answered: ''With what?'' Almaroad replied: ''You know what I'm talking about.''

Rasnake assumed that Almaroad was talking about union activity, which had become a matter of general discussion at the plant. With that topic in mind, she said; ''Well, you knew about it before I did, I'm sure. I didn't know anything about it.''

Almaroad said he was ''glad to hear that'' and offered ''some friendly advice.'' Almaroad continued:

> You stay away from it, don't have anything to do with it, it's just bad news. And nobody can force you to sign anything.[10]

Rasnake testified that in view of the common discussion of the union campaign at the time, she assumed that Almaroad was referring to the Union in his warning to her. In light of the surfacing of union activity including the meeting on February 17, and Rasnake's credited assertion, I find that it was reasonable for her to assume that the company management, including Almaroad, was aware of the Union's campaign. I also find that Rasnake reasonably inferred that Almaroad was referring to the union campaign in his quoted remarks to her.

In light of the Company's subsequent unfair labor practices, including unlawful discharges, Almaroad's advice to Rasnake regarding participation in union activity carried a ''sinister meaning.'' *Ohmite Mfg. Co*., 217 NLRB 435 fn. 2 (1975). His admonition to ''stay away'' and not to ''have anything to do with [the Union]'' together with the warning that ''its just bad news,'' when considered in the context of the Company's unlawful conduct in opposition to the Union, amounted to a threat of reprisals against Rasnake and other employees who might assist or support the Union. I find, therefore, that Almaroad's advice to Rasnake violated Section 8(a)(1) of the Act. *Bay State Ambulance & Hospital Rental*, 280 NLRB 1079, 1083 (1986).

Company employee Jeff Ritchie, who worked at the Norton plant, signed a card for the Union in February. Soon thereafter, Operations Manager Almaroad came to Ritchie's workstation, took him aside, and asked him if he had signed a union card. Ritchie admitted that he had. At this, Almaroad urged Ritchie to get the card back. Otherwise, Almaroad warned, Ritchie faced trouble and loss of his job. He instructed Ritchie to come to his office that same day and pick up a paper containing such a request, addressed to the Union. Ritchie did not comply with Almaroad's instruction.

Two or three days later, Almaroad stopped at Ritchie's machine and questioned him about his union card. Almaroad asked if Ritchie had sent a request for his card to the Union. When Ritchie answered, no, Almaroad told him to return to work. Almaroad went on to assure Ritchie that he would provide the necessary paper. It was almost lunchtime when the conversation ended. Almaroad returned to Ritchie with the request letter in time for Ritchie to take it with him as he went to lunch.

Ritchie took the request letter to his automobile parked outside the plant. After leaving the request there, he had lunch and returned to work. Ritchie never signed the request.

Early in March, Almaroad asked Ritchie if he had sent the withdrawal letter to the Union. Ritchie replied no, and that he had not had time to do so. Almaroad warned Ritchie that he had to retrieve his card ''because it's going to cost you your job.''[11]

I find that when he asked Ritchie if he had signed a union card, and, in the same conversation, solicited revocation of Ritchie's authorization card and threatened him with discharge if he did not do so, Almaroad was attempting to restrain and coerce him and thus cause him to refrain from further union activity. I also find that Almaroad, by urging Ritchie to send the revocation request to the Union on the two subsequent occasions, and by threatening him with discharge if he did not do so, again sought to eradicate employee participation in protected union activity. Accordingly, I find that by Almaroad's coercive interrogation, his solicitation of withdrawal of support for the Union, and by his threats of reprisal if such support were not withdrawn, the Company violated Section 8(a)(1) of the Act. *Sealectro Corp*., 280 NLRB 151, 158–159 (1986).

The Company again engaged in unlawful interrogation and solicitation of withdrawal of support from the Union, after employee Richard Shular had attended two union meetings and signed a union card. I find from his credible and uncontradicted testimony, that in late February, Loading Supervisor Allen Young asked Shular if he had signed a union card. When Shular said he had, I find from his testimony, that Young pursued the matter further. Young, in substance, offered to get the card back from the Union if Shular so desired. Young also offered to leave a paper near Shular, for the latter's signature, which Young would pick up later and use to retrieve the union card.

I find that by interrogating him about his union activity and soliciting his withdrawal of support from the Union, Young interfered with, restrained, and coerced Shular in the exercise of rights guaranteed in Section 7 of the Act. I further find, therefore, that the Company thereby violated Section 8(a)(1) of the Act.

Vivian Rasnake attended one of the Union's organizing meetings for the Company's employees on February 23. On the following morning, Company President George Hunnicutt Sr. met Rasnake at the Norton plant and requested production information from her. Rasnake went to the laboratory, where she kept such records, but was unable to locate them. She returned to George Sr. and reported that she was unable to locate the pertinent records.

[10] My findings regarding Almaroad's conversation with Rasnake on February 19 are based upon her credible testimony. Rasnake appeared to be candidly giving her full recollection of the incident.

[11] Roy Almaroad denied that he had ever asked any employees if they wanted to get their union cards back. Instead, he testified that in early March, Ritchie asked Almaroad how he could get his union card back. However, Almaroad admitted that he provided Ritchie with a form letter advising the Union that the signatory employee was revoking his or her authorization card. Further, Almaroad's sketchy testimony left uncontradicted the bulk of Ritchie's detailed testimony regarding conversations between them about the latter's union card in February and March.

Of the two witnesses, Ritchie appeared more conscientious about providing his best recollection. Accordingly, I have credited Ritchie's testimony regarding his conversations with Almaroad in February and March regarding his union card.

George Sr. invited Rasnake into an office and began to speculate as to the whereabouts of the missing records. He said he had an idea where they were; that Rasnake had given some information to union people. He asserted that Rasnake had been to a union meeting on the previous day and ''had her own private little meeting with one of the Union guys.'' He added: ''I was informed of this.''

Rasnake immediately denied that there had been a private meeting and left the office. She returned to the laboratory and renewed the search for the production records. She found them and returned to George Sr. Upon seeing Rasnake and the records, he apologized. He also said that he did not intend to make accusations. He concluded by inviting her to return later in the morning.

When Rasnake returned to George Sr., he looked at her and said he thought she ''should be faithful'' to him. He went on:

> I want to know where you stand with this thing, and I want a commitment from you by the end of this week, and you remember where your pay check comes from. [12]

By his remarks about Rasnake's attendance at the Union's meeting, and his assertion that he ''was informed of this,'' George Sr. strongly suggested that he was maintaining surveillance of his employees' union activities. I further find that by thus creating the impression that it was engaged in such unlawful conduct, the Company violated Section 8(a)(1) of the Act. *Link Mfg. Co*., 281 NLRB 294 (1986); *Teledyne McCormick Selph*, 246 NLRB 766, 773 (1979).

In the context of his remarks about her attendance at the previous evening's union meeting and his suggestion that she divulged company production records to the Union, George Sr.'s quoted remarks also ran afoul of the Act. His message was that he deemed Rasnake's adherence to the Union to be disloyalty to him and his company; that she had until the end of the week to renounce her adherence; and that if she failed to do so, the Company would soon inflict an economic reprisal upon her. By thus equating support for the Union with disloyalty and threatening her with an undisclosed economic reprisal if she failed to renounce the Union, the Company violated Section 8(a)(1) of the Act. *Peavey Co*., 249 NLRB 853, 858 (1980).

The Company employed Samuel Stapleton as a night watchman at its Norton facility from August 1985 until March 22, when he voluntarily resigned. I find from his uncontradicted testimony that in February Operations Manager Roy Almaroad asked him what he thought about the Union. I also find from Stapleton's uncontradicted testimony, that during the same period, Sales Manager Joseph (Huck) Hunnicutt posed the same question to him. In both instances, Stapleton remained silent. In neither instance of interrogation did the supervisor give assurance against reprisal by the Company. Nor was there any showing that the supervisors provided any lawful purpose for their questions. From these circumstances, and the added impact of the Company's resort to unlawful threats and other unfair labor practices in its antiunion campaign during February and thereafter in 1986, I find that this interrogation was coercive. Accordingly, I find that the Company's interrogation of Stapleton violated Section 8(a)(1) of the Act.

In February, Dwayne Sowers, a route driver employed at the Company's Harlan, Kentucky warehouse, became interested in the Union's campaign. During February, he attended several union meetings and signed a card for the Union. He also signed a poster supporting the Union, which was displayed on a bulletin board at the Harlan warehouse during February. The warehouse manager, Chris Morris, saw the poster with its signatures, including Sowers'.

At least twice during February, after the poster had appeared on the bulletin board with Sowers' signature on it, Chris Morris approached Sowers before a union meeting and asked if he planned to attend. Following such meetings, Morris asked Sowers if he had gone to the meeting and how many others had attended. At times, Sowers refused to answer, saying that it was none of Morris' business. On some occasions, Sowers answered that he had attended the meeting. Morris told Sowers that he, Morris, knew how many employees went to the union meetings. At one point, Morris asserted that there was 100-percent attendance. Sowers did not volunteer information about union activities to Chris Morris.

In the course of his remarks to Sowers regarding the union meetings, Morris warned, in substance, that if the Union's campaign succeeded, the Company might shut down its Harlan facility and transfer its function to Norton. Morris assured Sowers of continued employment at Norton. The distance between Norton and Harlan is approximately 70 miles, which would translate into an approximately 1-1/2-hour truck drive from Harlan and about 1-hour's drive from Sowers' home.[13]

I have considered all the circumstances surrounding Morris' interrogation of Sowers regarding the union meetings. I have noted that at the time of Morris' interrogation, he knew of Sowers' open support for the Union, that Sowers considered Morris to be a friend, and that Morris assured him of continued employment at Norton, if the Company closed its Harlan warehouse. I have also considered that Morris was not a senior member of the Company's management. However, Morris' unlawful warning that the Company might shut down the Harlan warehouse if the Union's campaign succeeded, and the Company's resort to other unlawful antiunion conduct, including reprisals, as found later in this decision, provided a coercive background for Morris' interrogation of employee Sowers.

In sum, I find that under all the circumstances, Morris' repeated questioning was likely to restrain or coerce Sowers in the exercise of his statutory right to support a labor organization. I further find, therefore, that by Morris' interrogation of Sowers, the Company violated Section 8(a)(1) of the Act.

[12] My findings of fact regarding Rasnake's encounters with George Hunnicutt are based upon her credible and uncontradicted testimony.

[13] I based my findings of fact regarding the allegation that Chris Morris interrogated employee Sowers, upon the latter's testimony. In assessing the credibility of Morris and Sowers, I considered the substance of their testimony and their demeanor. Sowers seemed to be providing his full recollection in a straightforward manner. In contrast, Morris did not provide any details of specific conversations. Instead, Morris denied initiating any conversations with employees regarding union activity during the Union's campaign. Morris asserted that employees initiated all conversations he had with them regarding the union campaign. I also noted that when Respondent's counsel questioned him about these conversations, Morris seemed reluctant to identify anyone except Eddie Jennings. Absent from Morris' testimony is any reference to a conversation with Dwayne Sowers.

See *Rossmore House*, 269 NLRB at 1177–1178, fn. 20. I also find that his coercive threat that the Company would close the Harlan warehouse if the employees supported the Union, also violated Section 8(a(1) of the Act.

Morris similarly violated the Act when he questioned Harlan route salesman Eddie Howard about union meetings. I find from Howard's credible testimony that on February 24, and on five or six subsequent occasions, Morris questioned him about union meetings. The first incident occurred at the Company's Harlan warehouse on the morning after Howard had attended his first union meeting. Morris asked Howard if he had been at the meeting. Howard did not answer.

Thereafter, on the morning following each union meeting Morris pursued the same line of questions. Morris asked Howard if he had gone to the meeting, who else had gone, and what was said at the meeting, Howard answered that he ''didn't know nothing.'' Indeed, Howard never disclosed to Morris what went on at the union meetings.

I also find from Howard's testimony that Morris repeatedly warned him that if the Union succeeded, the Company would close the Harlan warehouse. Morris also stated that Howard and the other Harlan employees would then have to choose between working at Norton or quitting. If Howard elected to work at Norton, he would have a daily commuting round trip of approximately 140 miles. His home is only about 1 mile from the Company's Harlan warehouse.

I find that Morris' interrogation of employee Howard occurred in circumstances which rendered it coercive. Howard attended union meetings and signed a card. However, his name did not appear on the poster on the Harlan warehouse bulletin board announcing support for the Union. Nor was there any showing that Howard otherwise openly supported the Union at the Harlan warehouse. Although Howard had friendly conversations with Morris, he thought of him more as a supervisor rather than as a friend. Thus, Howard was reluctant to share with Morris any information about the union meetings he had attended. The unlawful warning which accompanied Morris' interrogation of Howard was a major factor in setting the tone of the surrounding atmosphere. Employees were likely to repudiate the Union if the price of their support was the inconvenience of a 140-mile round trip between home and workplace. The final pieces of the backdrop for this interrogation were the Company's further unlawful attempts to squelch employee support for the Union, including economic reprisals against known union activists. I find, therefore, that by Morris' repeated interrogation of employee Howard about his union activity, and Morris' threat of economic reprisal, the Company violated Section 8(a)(1) of the Act.

On February 22, at the Company's Norton facility, employee Michael Stallard, who, had signed a union card, was loading soda pop into Sales Manager Joseph (Huck) Hunnicutt's pickup truck. Huck and Stallard began talking about the union campaign. Huck said he couldn't ask Stallard any questions about the Union. However, he began talking about employees signing union authorization cards and getting them back. Huck asked Stallard if he had signed a card. When Stallard said he had, Huck said he had a form in the office which Stallard could sign and use to get his card back from the Union. Stallard and Huck went to the office where they met Huck's brother, Pedro. Stallard filled out the form and spoke of mailing it to the Union. Huck advised Stallard to send the revocation by certified mail. After further discussion, Huck agreed that regular mail would suffice. Huck took Stallard to the Norton post office in his pickup truck, gave him money for a stamp, and waited while Stallard mailed his revocation form. Stallard got back into Huck's pickup truck and the two delivered the soda pop.[14]

I find that Huck's conduct violated the Act. For, after asking Stallard if he had signed a union card, Huck, who was a supervisor at the time, solicited him to withdraw his signed union authorization card. Huck then helped Stallard to do so, providing the form, a ride to the post office, and the price of a postage stamp. By thus soliciting an employee's withdrawal of his signed authorization card, and assisting him, the Company violated Section 8(a)(1) of the Act. *Craddock-Terry Shoe Corp*., 187 NLRB 33, 37 (1970). I also find that Huck's questioning of Stallard as to whether he had signed a card for the Union, coming in the context of an unlawful solicitation and other unfair labor practices, also violated Section 8(a)(1) of the Act.

Employee James Fultz was not a union activist and did not sign a union card during the Union's 1986 organizing campaign among the Company's employees. I find from Fultz' and Roy Almaroad's testimony and the Company's records, received in evidence, that the Company employed Fultz in March and May. I also find from Fultz' testimony that in March, at the Norton plant, Operations Manager Roy Almaroad asked Fultz if he had signed a union card. When Fultz answered no, Almaroad advised him that ''it would be best for you not to.''[15]

I agree with the General Counsel's contention that Almaroad's questioning of Fultz was unlawful. Almaroad questioned Fultz in an atmosphere of union animus resulting from company unfair labor practices. In addition, Almaroad's advice suggested that signing a union card would be detrimental to Fultz. Such a remark to Fultz by a high-ranking supervisor, at a time when the Company was inflicting economic reprisals upon union activists, as found later in this decision, was likely to discourage him from signing a union card or otherwise helping the Union. Accordingly, I find that

[14] I have credited Stallard's recollection of his encounter with Huck Hunnicutt on February 22. Stallard impressed me as a frank witness, conscientiously trying to give his best recollection. His testimony was consistent and he seemed genuinely concerned about its accuracy.

In contrast, Huck's testimony is impaired by serious inconsistencies. First, Huck testified that Stallard initiated the conversation regarding the revocation of union authorization cards. Huck also testified that Stallard asked him if he knew how to get a card back. At first, Huck testified that he went into the office, got the form for Stallard, and gave it to him. According to Huck's initial rendition, when Stallard first approached him, Huck asked Stallard if he had punched in. When Stallard said no, Huck directed him to do so and to load 9 cases of 32-ounce returnable Pepsi Cola into the pickup truck. In a second version, Huck testified that before Stallard loaded the pickup, he and Stallard went into the office, where Huck got the revocation form, and while there, he told Stallard to clock in and load the truck. When asked if he personally gave the form to Stallard, Huck testified: ''No. I believe Pedro did.'' These infirmities in Huck's testimony suggested that his recollection of this incident was faint at best, and that he was improvising.

In short, of the two witnesses who testified about the conversation and circumstances leading up to the mailing of the revocation form on February 22, Stallard impressed me as being more reliable. Accordingly, I have accepted his testimony.

[15] I have accepted Fultz' testimony, notwithstanding his poor memory as to dates. Fultz gave his testimony candidly. Also, as he gave his uncontradicted recollection of this encounter with Almaroad, Fultz seemed to be reliving it.

Almaroad's question and his thinly veiled warning of economic reprisal violated Section 8(a)(1) of the Act.[16]

I find from employee Bobby Ray Worley's uncontradicted testimony that he signed a union card during the Union's 1986 organizing campaign among the Company's employees. I also find from Worley's testimony that he advised Supervisor Robert Mullins that he had done so. Finally, I find from Worley's testimony that Mullins offered a form letter, addressed to the Union, which declared that the signatory was revoking any authorization or membership application he or she might have executed in the Union's favor. Mullins told Worley he could use the form to revoke his card or throw it away if he did not wish to get his card back. He did not express any interest in finding out how Worley would dispose of the form.

Under Board law, the Company, acting through Supervisor Mullins, could lawfully provide employee Worley with a form letter to revoke his union card even though Worley had not solicited such a form, so long as the Company made no attempt to find out if he used it nor offered any assistance or otherwise pressured hinn into using the form to revoke his card. *Mariposa Press*, 273 NLRB 528, 529 (1984). Here, I find that Supervisor Mullins' conduct did not exceed those limits. Indeed, Mullins plainly told Worley he could use the form letter or discard it. I find, therefore, that Mullins did not violate Section 8(a)(1) of the Act, as alleged in the complaint. Accordingly, I shall recommend that this portion of the complaint be dismissed.

On March 27, Pedro Hunnicutt confronted employee Vivian Rasnake at the Company's Norton plant and ordered her to remove a union button from her shirt.[17] The button, which was about the size of a silver dollar, said ''Vote Teamsters'' and was colored red and black. Pedro pointed to the button, stated that the Company had rules against the wearing of jewelry, and that the button was jewelry. Rasnake protested that she understood the prohibition extended only to jewelry worn on hands and arms. Pedro renewed his order, and added that he feared that the pin would fall off into a sugar tank or a syrup vat and contaminate their contents.

At the time Pedro ordered the removal of her union button, Rasnake was a quality control employee. Her work required that she remove samples of high fructose corn syrup from tanker trucks and from a tank in the Company's syrup room. The Company uses high fructose corn syrup in the manufacture of its products.

When removing syrup from a tank Rasnake leaned over an open manhole in the top of the tank, and reached down with a ladle. According to Pedro's testimony, he ordered Rasnake to remove the union button because he feared it would wind up in the syrup. It was his view that, as she reached down with a ladle, Rasnake would rake the button across the edge of the manhole and pull it off into the syrup below. Pedro also testified that in his discussion with Rasnake about the button, he called her attention to the quality control policy in the Pepsi-Cola Company's manuals which the Company had on hand.

The Pepsi-Cola Company's policy toward personal adornment is recited in its statement of good manufacturing practices, which it had promulgated to the Company in mid-1985. In a statement of policy regarding personal cleanliness, the Pepsi-Cola Company required employees to remove ''jewelry from the hands and arms.'' The Food and Drug Administration Regulations accompanying them in the record direct the removal of ''all insecure jewelry'' and the removal from hands of ''any jewelry that cannot be adequately sanitized.'' Finally, the FDA Regulations direct the taking of ''any other necessary precautions to prevent contamination.'' Neither the Pepsi Cola Company's statement of good manufacturing practices, nor the FDA Regulations single out the handlers of high fructose corn syrup for more stingent constraints.

Pedro's union animus, as shown by his unfair labor practices found elsewhere in this decision, the Company's earlier unlawful attempts to discourage Rasnake's union activity, and the Company's implementation of the jewelry prohibition cast serious doubt on his expressed reason for demanding removal of Rasnake's union button. Prior to March 27, and thereafter, the Company's enforcement of Pepsi-Cola's prohibition against the wearing of jewelry was lax.

Pedro conceded that he had seen other employees wearing union buttons at the Norton plant and that he had ignored them. I also find from Rasnake's uncontradicted testimony that during her employment by the Company, as a quality controller from September 1982 until April 23, she was aware of, and complied with, the prohibition against wearing jewelry on hands and arms. However, quality control employee Agnes Martin, who worked with Rasnake in the syrup room, and extracted syrup samples from truck tanks and the syrup room tank, habitually wore a watch and two rings at work, both before and after March 27. Employee Greg Hill, who worked in the syrup room after the promulgation of the Pepsi-Cola Company's prohibition against jewelry in 1985, regularly wore a watch at work.[18]

While there was no direct evidence that Pedro or Almaroad observed these violations, the record shows they were active supervisors, who regularly circulated through the Company's Norton plant. Therefore, I find it likely that they observed Martin, Hill, and Taylor, but neglected to enforce the rule against them. It was only when a union button appeared on Rasnake's shirt that Pedro attempted to implement the prohibition against jewelry. I find that by disparately applying its jewelry prohibition against Rasnake because she wore a button expressing support for the Union, the Company violated Section 8(a)(1) of the Act. *Pay 'N Save Corp*., 247 NLRB 1346 (1980).

On March 8, 15 days after receiving the first letter heralding the Union's organizing campaign, the Company, for the first time in its history, installed four fixed television cam-

[16] In finding Almaroad's remarks to Fultz included an implied threat violative of Sec. 8(a)(1) of the Act, I noted that the complaint did not allege that they did so. However, the facts necessary to this finding were uncontroverted and were fully litigated at the hearing. In these circumstances, it is within my authority to recommend a remedy of such a violation and thus to effectuate the purposes of the Act. See, e.g., *St. Joseph Hospital East*, 236 NLRB 1450 (1978).

[17] The facts regarding Pedro's confrontation with Rasnake are essentially undisputed.

[18] The General Counsel's brief asserts that employees George Taylor and Chico Vega wore jewelry while working in the syrup room. However, the record does not show that they worked in the syrup room after the promulgation of the Pepsi-Cola Company's jewelry prohibition. Accordingly, in assessing the evidence supporting the General Counsel's contention of disparate enforcement of that rule, I have not included Rasnake's testimony that she saw Taylor and Vega wearing watches while they worked in the syrup room. Rasnake could not remember when either of these employees worked in the syrup room.

eras at its Norton, Virginia plant. The cameras were deployed as follows: two in protective boxes hung from the rafters over the loading dock; one in a protective box mounted in the staging area, high on the wall adjacent to the loading dock; and, one behind a wall and a clock in the quality control laboratory.

The Company linked the cameras to a switcher, a monitor, a VCR, and a video cassette recorder. The switcher controlled the length of time and order in which each camera was turned on. Thus, whoever was watching the monitor would see the field of vision of each of the operating television cameras for from 6 to 10 seconds at a time. The VCR was attached to a time lapse recorder. When the VCR system was switched into the system, the film would record what each camera saw in sequence, for 6 to 10 seconds at a time. The monitor was located in the vicinity of the plant office, in a separate room, to which Pedro, Roy Almaroad, and security guard W. A. Jones had access.

In April, the Company added five fixed cameras to it television circuit. All five were in plain view. The five were installed as follows: one in the can filler room; one in the syrup room; one in the nonreturnable bottle filler room; one in the returnable bottle filler room; and, one in the bottle cleaner/washer area.

When the Company completed its television system it had nine cameras. However, due to the switcher's limitation, only eight cameras were operating at any given time.

One of the loading dock cameras looked east and the other looked west. Trucks entered from either side of the loading dock area. The camera facing east showed parked trucks and the top of the east door. If there were no trucks, the camera showed the dock area and the east door. When trucks were parked, the camera showed the trucks parked closest to it and unobscured portions of the other trucks on the east end. The camera facing west showed the back door of the loading dock, and any trucks lined up behind the dock. These two cameras would show employees loading both sides of a truck. The camera covering the staging area, adjacent to the loading dock, focused on the pallets of products assembled there for easy access to the loading dock.

The camera in the quality control laboratory focused on the entrance. Employee Vivian Rasnake discovered this camera behind a clock on the laboratory's wall. The lens peered through a portion of the clock's case, where paint had been scraped away.

Four of the remaining five cameras focused on production. The syrup room camera, which was mounted on a steel support column, had ''an extremely wide angle lens.'' The lens put in view the openings of all mixing tanks in that room, the entrance from the storage part of the syrup room and part of the entrance to the nonreturnable filling room.

The camera in the nonreturnable filling room focused on the discharge and the in-feed of the filler. This camera also televised bottles as they went between the filler and the capper.

The camera in the returnable filling room was mounted 8 to l0 feet above the floor in a corner. It picked up the infeed and discharge of the filler, the empty bottle inspection, the manual inspector, and the filler operator. The filler operator and the manual inspector were ''basically the only people that work in that room.

A television camera, mounted on the ceiling of the can filling room, pointed straight down. It televised the empty cans coming into the can filler and the filled unlidded cans as they flowed between the filler and the seamer. The camera focused in on the cans. The filler operator was usually out of the picture. Occasionally, the camera showed the operator's hands as he tended cans on the line.

The television camera in front of the bottle washer looked down through a narrow area between the returnable and nonreturnable filler rooms and the rest of the production area. The camera's field of view included the bottle conveyor carrying the washed empty unsealed bottles from the front of the washer into the returnable filling room. The camera would show the washer discharge operator at work.

I find from Roy Almaroad's testimony that, assuming the four production line cameras and the bottle washer camera were operating, approximately six employees would be in view. I also find from his testimony that the Company has never operated all of its production lines simultaneously, and that, at most, four employees working in the areas covered by those five cameras would be on camera at any given time. Neither Almaroad nor any other witness provided similar estimates of the numbers of employees who might be televised by the four original cameras.

The Company did not send any notice or otherwise announce the installation of the television system to its employees. Almaroad did not think it was necessary to tell them about it. Nor did the Company advise quality control employees Agnes Martin, Jerry Heard, and Vivian Resnake about the television camera hidden behind the clock in their laboratory.

On Saturday, March 8, night watchman Samuel Stapleton observed the installation of the first four TV cameras at the Company's Norton plant. He watched as the workmen ran TV wire into a concealed room.

On two or three occasions on the same day, Stapleton attempted unsuccessfully to find out more about what he believed was a TV system. He questioned Pedro. At first, Pedro answered that he would let Stapleton know what was going as soon as he, Pedro, found out. In their last discussion, Stapleton stated that he knew what the Company was doing.

Pedro responded: ''[Y]ou may see what I'm doing, but until I see fit to tell you what I'm doing, I expect you to keep your suspicions to yourself.''

Soon after the installation of the five TV cameras in April, three employees asked Pedro to explain their purpose. Pedro explained that there was concern growing out of ''the second Tylenol tampering episode and the public's perception about the safeness of our product, and that anybody who did tamper might find himself on the film.'' Pedro went on to state that ''the primary reason for those cameras was to demonstrate that there had been no tampering. To show that it didn't happen in our plant.''

The General Counsel contends that the Company used its television cameras and monitoring system to engage in surveillance of its employees' union activities. The Company denies that union activity had anything to do with the installation and subsequent use of its TV system. Instead, asserts the Company, it installed the TV system to protect its products from contamination and pilferage and to protect its equipment from damage and pilferage.

The circumstances surrounding installation of the TV system at the Company's Norton, Virginia plant provide support for inferences that it was intended as a means of watching for union activity and as an object of concern to employees, which, if unexplained, would lead them to conclude that management was on the lookout for union activists. Although Pedro and his father, George E. Hunnicutt Sr., had considered such a system for 2 years, they waited until March 8, only 18 days after the inception of the Union's organizing campaign to install a 4-camera system with monitoring and videotaping components. By that time the Company's management had already shown its strong hostility toward the Union and prounion employees by repeated violations of the Act. Further, the Company made no announcement of its intention to install the system and its reasons for doing so.

The Company asserts that union activity played no part in the decision to install the TV camera system. George Hunnicutt Sr. flatly denied that the Union had anything to do with his decision to authorize its installation.

Included among the reasons urged by the Company for the installation of its TV system are pilferage and vandalism. There is much testimony offered to lend credence to these proffered reasons. I have credited W. A. Jones' testimony that when he first urged George Hunnicutt Sr. to install a TV system at the Company's Norton plant in 1981, he mentioned theft and vandalism as the reasons. In its brief, the Company points to testimony of members of management that since the TV system's arrival, vandalism and pilferage have diminished. Roy Almaroad testified that he favored installation of the TV system as a preventive against product contamination, pilferage, and vandalism. In his testimony regarding the reasons for installing the TV system, Pedro asserted that the Company had ''experienced a considerable amount of pilferage and vandalism.''

However, concerns about pilferage and vandalism do not assist the Company's defense. For, according to George Hunnicutt Sr., who made the decision to install the TV system, and ordered Pedro to implement it, only the danger of product contamination motivated him. Thus, George Sr. testified that two incidents, in which Tylenol was contaminated, caused him to discuss such a system with A. W. Jones, but that two reports of ground glass in cans of company products ''triggered off the purchase of [the cameras].'' Therefore, it was George Sr.'s expressed concern on which I focused when I considered the issue of motivation.

Pedro's testimony conveys the same fear of contamination as the catalyst in his effort to implement his father's order. Thus, Pedro testified that the two Tylenol contamination reports caused him to look into the installation of a TV system. He also testified that he did not act with any urgency on the project until glass particles appeared in a can of Sunkist Orange, in February.

The Company's placement of the first four TV cameras on March 8 suggested that protection from contamination of its products was not their purpose. Thus, the Company placed none of the cameras along the production lines, where unsealed cans and uncapped bottles were vulnerable to contamination. Instead, the Company furtively hid a camera behind an innocent clock in the quality control lab pointed at an entry door, suspended two cameras, concealed in boxes, from the rafters overlooking the loading dock and placed the fourth, concealed in a box, overlooking the staging area.

Vivian Rasnake and her two colleagues, who worked in the quality control lab, did not produce anything for public consumption. However, Pedro, George Hunnicutt Sr., and Roy Almaroad were aware of Rasnake's support for the Union before February 28, when the Company received a letter from the Union announcing that fact. I have found that as early as February 19, the Company revealed its suspicion of Rasnake's prounion sentiment, when Almaroad warned her to stay away from the Union. On February 24, in remarks to Rasnake, George suggested that the Company was already keeping her union activity under surveillance. In light of the Company's interest in Rasnake's union activity, and the concealment of the camera in the quality control lab, secreted behind a clock, and pointed at the lab's entrance, I find that the Company was attempting to watch Rasnake to see if she was engaging in union activity and identify employees who might be joining her in such activity.

The two TV cameras covering the loading dock were likely to focus on driver-salesmen, forklift operators, and other employees as they mingled during the loading of company products in capped bottles and sealed cans into delivery trucks or during the performance of tasks related to loading. Many employees listed as union activists on the letters which the Company received from the Union on February 21 and 28 worked on the loading dock or were present there during their working hours. I have also found that on February 17, Assistant Operations Manager Robbie Mullins interrogated forklift driver John Baker regarding his union activity.

Further, in February and early March, there were repeated manifestations of company interest in identifying union supporters and persuading them to abandon the Union. The record is replete with instances in February and early March, prior to the arrival of the four TV cameras, in which the Company's management, including Pedro, his brother Huck, and Almaroad, interrogated employees about their union activity or solicited the withdrawal of their union authorization cards. This unlawful conduct showed the motive for the placement of the two cameras on the loading platform. I find, therefore, that the Company installed the two TV cameras on the loading platform to assist in the eradication of union support among its employees.

Similarly, I find that the Company focused the fourth camera on the staging area to show forklift drivers and laborers mingling as they worked. Here were likely opportunities for union supporters to hand out authorization cards and prounion literature. Here, again, employees named in the Union's letters of February 21 and 28 would be visible on the TV monitor.

Nor do I credit the Company's claim that it installed the remaining five cameras to prevent contamination of its products. Granted, that four of those cameras point at the production process, and that the fifth is aimed at the returnable bottle washer. Nevertheless, the Company's failure to explain the presence of the TV system to all but three employees, and its tardy installation 2 months after Pedro claimed he was galvanized into action in February by the appearance of glass particles in a can of Sunkist Orange, cast serious doubt on its explanation. Here, again, the Company's persisting resort to conduct violative of the Act in its effort to eradicate employee support for the Union, points to the real motive behind the installation of the five additional TV cameras.

I find from Roy Almaroad's testimony that he, George Hunnicutt Sr., and Pedro had access to the TV monitor since its installation on March 8. I also find from Almaroad's testimony that he frequently reviewed 20 or 30 minutes of television tape showing activity on the night shift. There was no showing that George Sr. or Pedro watched the monitor, or reviewed any TV tape.

Security officer W. A. Jones also admitted watching the monitor during the night shift, as part of his duties. However, there was no showing that he participated in the Company's antiunion campaign or that he was looking for union activity when he looked at the monitor.

However, I find that Almaroad, while reviewing the video film, was on the lookout for union activity. Given Almaroad's demonstrated hostility toward the employees' union activity and his leading role in the Company's antiunion campaign, there can be little doubt that he was interested in uncovering union activity. His resort to unlawful interrogation, as found above, reflected a desire to identify union supporters and activists for that purpose. Viewing the night shift TV film would certainly provide opportunities to spot a conversation between suspected union supporters, or the movement of authorization cards or prounion literature from one hand to another, on the loading dock or in the staging area. I also find it likely that Almaroad monitored the entrance to the quality control laboratory and the other areas of the plant covered by the TV system, during the day shift for the same purpose.

In sum, I do not credit George Hunnicutt Sr.'s testimony that the Union had nothing to do with his decision to install a TV system. Nor do I credit his and Pedro's testimony that reports of glass particles in the Company's products triggered that decision and its implementation. Instead, I find that the Company installed the nine television cameras and its monitoring system to assist in its antiunion campaign. I further find that Roy Almaroad engaged in surveillance of employees' union activity and that the Company thereby violated Section 8(a)(1) of the Act. *Intermedics, Inc*., 262 NLRB 1407, 1415 (1982).

The sudden, unexplained presence of television cameras at the Norton plant, in the midst of the antiunion campaign, was likely to give employees the impression that the Company was looking for union supporters. Rasnake, who had suffered unlawful interrogation and warnings, only became aware of the television camera in her workplace when she discovered its lens pointed at her through a clock. The Company, through Pedro, provided an economic explanation to only three of its employees. The bulk of the Company's Norton employees were left to draw their own conclusions as to the Company's purpose in suddenly pointing TV cameras at them. I find that by its conduct the Company created the impression among its employees that their union activity was under surveillance, and thus violated Section 8(a)(1) of the Act. *Conair Corp*., 261 NLRB 1189, 1276 (1982).

The amended consolidated complaint did not allege that the Company violated Section 8(a)(1) of the Act by creating the impression of surveillance. However, I find that this conduct was sufficiently related to the sustance of the amended consolidated complaint as to warrant a specific finding of a violation of Section 8(a)(1) of the Act. *Alexander's Restaurant*, 228 NLRB 165 (1977). The Company's creation of the impression of surveillance was but one facet of its campaign to eradicate the Union's support among its employees. I also note that the Company's conduct in creating the impression of surveillance was fully litigated at the hearing and that the Company had ample opportunity to offer, and in fact did offer, evidence on this conduct.

In late February or early March, the Company for the first time posted regulations regarding the wearing of uniforms bearing product logos or trademarks. Included in these regulations, which Pedro prepared were the following:

> 1. Employees should wear only approved uniforms. The Company only orders approved uniforms, but the mixing of items from the approved uniform at two different franchisors or with any item not a part of the approved uniform would be in violation of this regulation.
>
> 2. Employees who wear uniforms and meet the public must refrain from wearing any badges, signs, logos, slogans, or insignia of any type which did not come on their uniform from the factory.
>
> 3. Employees should wear their uniforms only while actually engaged in the performance of their duties as employees or while in transit directly to or from work. *Do not* wear your uniform at any other time or place except as expressly authorized in advance by an officer of this company. Any employee who is observed to be wearing a uniform while in a disreputable place or while engaging in conduct which reflects adversly upon that uniform and/or the products it is identified with will be in violation of this regulation. This regulation prohibits wearing the uniform while engaging in any personal business, or in any public demonstration of any kind. *While this Company respects the rights of its employees to engage or not to engage in union activity, we must point out that this regulation will operate to prohibit the conducting of union activities in public places by any employee while wearing a uniform.*

The General Counsel contended that the Company promulgated the quoted rules to curtail its employees' union activity, and thereby violated Section 8(a)(1) of the Act. The Company urges dismissal of this allegation on the ground that these regulations constituted a longstanding policy designed to protect the reputations of its products' trademarks and logos.

The right of employees to wear union insignia is protected by Section 7 of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Virginia Electric & Power Co. v. NLRB*, 703 F.2d 79, 81–82 (4th Cir. 1983). The promulgation of a rule prohibitlng the wearing of such buttons constitutes a violation of Section 8(a)(1) in the absence of evidence of ''special circumstances'' showing that such a rule is necessary to maintain ''production, discipline, or customer relations.'' *Albertson's, Inc*., 272 NLRB 865, 866 (1984).

When read together, regulations 1 and 2 quoted above, prohibit all company employees from wearing union insignia on their uniforms, whether at work, on a break, or on their own time, and whether they paid for them, or the Company provided them. The Company has not made any effort to show that the wearing of union insignia by its employees would interfere with production, impair plant discipline, or have an adverse impact on its customer relations. Thus, the

Company has not shown circumstances which would excuse the quoted strictures against the wearing of union insignia. Accordingly, I find that by promulgating those rules, the Company violated Section 8(a)(1) of the Act.

The third regulation prohibits employees from wearing uniforms bearing logos or trademarks of the Company's products while engaging in union activity during nonworking time, outside the plant. Again, the Company has not provided any business reason which would outweigh the Section 7 right of its employees to engage in union activity in a uniform bearing a product identification. That the Company had prohibited one employee from buying anymore uniforms because he was intoxicated while wearing one or that it had disciplined an employee for wearing a uniform while standing in front of a ''girlie'' show did not warrant imposition of the third regulation. For neither of those incidents involved a right protected by Section 7 of the Act. I find that the third regulation is an excessive impediment to employee union activity, and that by promulgating this rule, the Company violated Section 8(a)(1) of the Act.

C. *The Alleged Discrimination*

1. Bobby Boyd

a. *The facts*

The Company employed Bobby Boyd for varyiny periods totaling 28 years between 1954 and his discharge on July 3. From 1954 until December 1985, Boyd was a forklift operator. From January until his discharge, the Company employed him as a general laborer. In the course of his employment, prior to July 3, the Company had discharged or laid him off six times.

Boyd became a union supporter in February. He signed a union card on February 16. On February 28, the Company received a letter from the Union listing Boyd as a member of its organizing committee.

In March and April, Boyd handbilled for the Union three or four times, at the corner of 12th Street and Park Avenue, just outside the Company's Norton plant. He participated in this union activity with employees Vivian Rasnake, Larry Blanken, and Francisco Vega.

In late March or early April, after Boyd had handbilled for the Union in his Pepsi-Cola uniform, Pedro confronted him at the plant, said that he had heard that Boyd was giving out union badges on company time, and threatened to lay Boyd off. Boyd protested that he had not handed any union badges out. Pedro told Boyd that he could not pass out union badges during work hours, but did not carry out his threat. There was no showing that the Company had any no-distribution rule posted or in effect at the time of this incident.

During the same conversation, Pedro noted that Boyd was wearing a union badge. Pedro ordered Boyd to remove the badge and enjoined him from wearing it on his Pepsi-Cola uniform thereafter. Boyd removed the badge.

On April 2, Boyd handilled for the Union outside the Norton plant, dressed in a Pepsi-Cola hat and a Pepsi-Cola shirt. The next day, when Boyd arrived at work, he met Pedro at the timeclock. Pedro warned that he would send Boyd home, the next time Boyd handbilled in his Pepsi-Cola uniform.

Later, on April 3, Pedro issued a correction notice to Boyd. The correction notice stated that the reason for its issuance was that Bobby Boyd had broken a rule or regulation. The notice went on to explain the specifics of Boyd's infraction, as:

> participating in public demonstration in uniform. You were previously verbally warned for being intoxicated in public while you were in uniform.

The notice went on to advise Boyd that this was his ''final warning,'' and that the ''next incident of misconduct will result in dismissal.''

On April 4 or 5, Supervisor Jerry Ryan, while getting ready for supper at his home, heard Boyd, who was residing there, talking to Diane Ryan, Jerry's sister-in-law, about his expectations from the Union. At this point, Ryan asked Boyd if he had offered a union card to Supervisor Dale Kennedy. Boyd admitted that he had done so in the breakroom, after Kennedy had bought a cup of coffee for him. At this, Ryan responded: ''Bobby, that ain't no joking matter. If you don't keep your mouth shut and do your job, they'll—you'll get fired.[19] They'll get rid of you.'' Ryan also said he had heard that Boyd, and employees Vivian Rasnake and John Baker would be fired. He urged Boyd to abandon the Union for the sake of his job.[20]

On Friday, May 16, Boyd moved a route truck from the loading area and backed into a space outside the plant, on 12th Street. Boyd noticed that Pedro's automobile was parked out in the street and was in the way. Boyd went into the plant and asked Pedro's permission to move his auto. Pedro rejected Boyd's assistance and went out to move his car.

As Pedro approached his auto from the rear, on the driver's side, he noticed a crease along the top of the fender, which, according to Pedro, was 2-1/2 to 3 feet long and one-eighth of an inch deep. According to Operations Manager Roy Almaroad, who arrived on the scene soon after Pedro had seen the damage, ''there was a deep gash down the side of Pedro's car that was probably three or four feet long.'' Huck, Pedro's brother, testified that he ''saw where it was scraped.'' When asked if there was a dent, he testified: ''Small—yeah. It was pushed in.''

Pedro examined the damage closely and found fiberglass particles from a truck fender in the crease and on the ground below. He then checked the trucks parked at the end of the

[19] Ryan testified that he intended to tell Boyd to keep his mouth shut while he was on the job. However, neither his testimony nor Boyd's showed that Ryan expressed that intention. In any event, I find from Ryan's testimony that the Company did not have a no-solicitation rule at the Norton plant at the time he spoke to Boyd, or at any time material to these cases.

[20] Supervisor Ryan admitted discussing Boyd's solicitation of Dale Kennedy and warning Boyd to keep his mouth shut and do his job. However, by his answers to leading questions Ryan denied saying anything to Bobby Boyd about Rasnake and Baker being fired. The frank and straightforward manner in which Ryan made his admission contrasted sharply with his ''No, sir'' in answering the carefully worded questions which the Company's counsel asked when directly examining him about remarks he might have made about Rasnake and Baker. This contrast and the uneasiness with which Ryan answered these leading questions caused me to doubt the reliability of these denials.

Boyd's recollection of who was present at the conversation, and Ryan's exact words did not square with his affidavit of August 7. However, his testimony as to the warning was essentially consistent with what he had said in that affidavit. In this instance, Boyd seemed to be sincerely trying to give his full recollection of Ryan's remarks. Accordingly, I have credited Boyd's testimony regarding Ryan's warning that he had heard that the three union supporters would be fired.

street, and found that unit number 8304's front fender had paint flakes of the same color as his auto.

Pedro returned to his auto and soon saw Bobby Boyd parking another truck. As Boyd passed by, Pedro asked him if he had parked 8304. Boyd answered yes. Pedro asked if he had ''just now parked it.'' When Boyd again said yes, Pedro accused him of hitting the auto. Boyd vigorously denied the accusation. With the assistance of Roy Almaroad, who walked up after Boyd's denial, Pedro convinced himself that Bobby Boyd had hit his car.

Pedro sent Bobby Boyd home at about 3:45 p.m., telling him to come back on Monday. On May 16, Boyd began work at 1 p.m. As a result of Pedro's action, Boyd lost about 8 hours' work on that date.[21]

On Monday, May 19, Boyd returned to work. Pedro and Roy Almaroad issued a written warning to Bobby Boyd. The warning stated that the reason for its issuance was ''Improper Conduct.'' The portion of the form provided for an explanation of the reason for the corrective action contained the following:

> Backed into private vehicle while parking Company truck. Did not report accident. Would not admit action when confronted with proof of collision. He had been previously warned for reckless operation of forklift and prohibited from operating same in future because he said he didn't see person he almost ran over.

In the space set aside for describing the corrective action, Pedro and Almaroad inserted:

> written warning. Further misconduct will result in severe discipline. Prohibited from operation any equipment belonging to this company from now on.[22]

On July 1, Huck issued a verbal correction notice to Boyd for loafing instead of sorting bottles, and for insubordination. There is no allegation before me that this disciplinary action violated the Act.

On July 2, Boyd attended a union meeting at the Norton Holiday Inn. On the following day, at work, Huck Hunnicutt asked Boyd if he had attended the union meeting on the previous evening. Boyd answered: ''I sure did.''[23]

Later, on the same day, Boyd was on the loading dock, stacking cases of empty 32-ounce glass bottles on pallets. Boyd was using one pallet per stack of four cases. At one point, he was holding a case of empties at about the middle of his body, somewhat bent over, 2 or 3 feet above the floor, and saw that he had no pallet below. He released the case and it landed on the floor without breakage. As he worked, Boyd had his back to George Hunnicutt Sr. who was walking down the loading dock toward him.

Boyd saw George Hunnicutt Sr. approaching. When Hunnicutt Sr. got to Boyd, he began to scold him. ''God damn you, don't throw my bottles down like that! I ought to wear you out with my damn walking cane!'' As he spoke, Hunnicutt Sr. raised his cane and drew it back. He warned ''I ought to ram this up your God damn ass if you throw my bottles down like that.'' Boyd had never seen George Sr. ''that wild before.''[24]

Management trainee Robinson testified that Boyd broke bottles when he dropped them on July 3, and that he, Robinson, saw the damage. However, there was no showing that Robinson told George Sr. of the breakage on that day or any other time. In his testimony before me, George Sr. disclaimed any knowledge of breakage attributable to Boyd's asserted misconduct.

[21] Pedro testified that after he had concluded that Boyd had hit his auto, he ''was mad about it,'' and that he told Boyd ''to just get out of my sight and stay away from me for the rest of the day.'' Pedro neither admitted nor denied that he sent Boyd home for the rest of the day. Indeed, counsel did not ask him if he had sent Boyd home. I relied upon Boyd's credible and uncontradicted testimony for my findings that Pedro sent Boyd home at about 3:45 p.m., on May 16, that Boyd began work that day at 1 p.m., and lost 8 hours' work as a result of the suspension.

[22] Bobby Boyd testified that on Sunday, the day before he received the written warning, Huck Hunnicutt and D. R. Robinson assured Boyd that he had nothing to worry about because he had not struck Pedro's car. Also, according to Boyd's testimony, Robinson said that Roy Almaroad's son-in-law had hit Pedro's car. However, neither Huck Hunnicut nor D. R. Robinson have corroborated this testimony. In his testimony before me, Boyd persisted in denying that he hit Pedro's auto. The vehemence with which Boyd expressed that denial suggested to me that he has flatly refused to consider the evidence showing that he probably scraped and dented a fender on Pedro's car. It also seemed likely that Boyd's mindset had skewed his recollection of conversations with Huck Hunnicutt and Robinson on May 18.

[23] I based my findings of fact regarding Huck Hunnicutt's interrogation of Bobby Boyd on July 2, upon the latter's uncontradicted testimony.

[24] I find from Pedro's and Hunnicutt Sr.'s testimony that the elder Hunnicutt made the decision to discharge Boyd based on his own observation and assessment of the latter's treatment of the case of 32-ounce bottles. According to Roy Almaroad's testimony, the Hunnicutts, Pedro and George Sr., told him, prior to the discharge, that Boyd ''had thrown some cases of 32-ounce bottles, from a distance across on to the floor, breaking the bottles.'' According to George Sr., he saw Boyd ''take this case of thirty-two ounce bottles and absolutely slam them down on the floor.'' However, Pedro testified that his father told him that Boyd had pitched cases. In sharp contrast with these observations, the discharge notice issued to Boyd on the same day asserted only that he had dropped a case ''from waist-high.'' These inconsistencies cast serious doubt on the reliability of George Hunnicutt Sr.'s testimony before me regarding what he saw as he approached Boyd on the loading dock on July 3.

At the hearing, over the objection of counsel for the General Counsel, I received the affidavit of company employee William G. Cheek in evidence as offered by the Company. I accepted the affidavit under the business record exception to the hearsay exclusionary rule.

However, in her brief, counsel for the General Counsel renewed the objection on two grounds. First, she urged that the affidavit is hearsay, and not admissible as a record of regularly conducted activity, made in the course of the Company's business, within the meaning of Sec. 803(6) of the Federal Rules of Evidence. Counsel also contended that the exception to the hearsay rule based upon the unavailability of the declarent does not apply here, as there has been no showing that Cheek was not available, as required by Sec. 804 of the Federal Rules of Evidence. Upon reconsideration of my ruling in light of the cited provisions of the Federal Rules of Evidence, I find that the affidavit is hearsay and thus is not admissible. Accordingly, I revoke that ruling and order that it be withdrawn from evidence and placed in the rejected exhibit file.

In any event, even if I retained the affidavit in evidence, I find that its contents raised questions as to its credibility. Thus, I noted that in the second sentence of the second paragraph of his affidavit, Cheek asserted that Boyd '''threw' the empty 32 oz. case of empty bottles.'' However, in the next sentence, Cheek stated that Boyd ''was dropping the cases from a waist-high position.'' I also noted that Cheek stated that he heard ''the sound of breaking bottles,'' an assertion missing from Hunnicutt Sr.'s testimony and the discharge notice. Thus, even if I retained the affidavit as an exhibit, I find that its contents are unreliable and would not credit them.

Finally, I considered Boyd's testimony and the discharge notice as bases for findings of fact. I noted that they agree that Boyd dropped one case of 32-ounce bottles, and are not far apart as to where he dropped it from, in relation to his body. However, Boyd testified that he bent over as he dropped the case, and that it was only 2 or 3 feet above the dock's platform. Of all the witnesses who testified regarding this incident, Boyd impressed me as being the most ingenuous. Accordingly, I have credited his testimony where it differs from the discharge notice and the testimony of George Hunnicutt Sr., and the other witnesses, with regard to his treatment of the case of 32-ounce empty bottles on July 3.

Boyd protested, denying that he had thrown the bottles down. He explained that he had dropped the bottles so that he could look for a pallet. Hunnicutt Sr. did not accept this explanation.

Pedro started down the loading dock and saw his father at the other end, punctuating his speech with his cane. When Pedro arrived at the scene, his father told him that ''Bobby had been standing, pitching the cases down from waist high.'' Absent from Hunnicutt Sr.'s remarks to Pedro was any mention of damage resulting from Boyd's handling of the 32-ounce bottles. Nor did Pedro see any breakage as he listened to his father. Finally, Hunnicutt Sr. instructed Pedro to: ''Take him back there and fire him.''

Pedro instructed Boyd to punch out and go to the breakroom. Boyd complied. Pedro prepared a separation of employment notice, which Almaroad handed to Boyd. The completed form indicates that the Company discharged Boyd for insubordination, carelessness, and willful misconduct. The notice also provides the following explanation of the stated reasons:

> Observed by G. Hunnicutt, Sr. to drop case of empty bottles onto dock floor from waist-high. No attempt to bend over and set them down. No attempt to set them on pallet he dropped them beside. This constitutes overt and willful misconduct. It is unsafe (creates hazard from flying glass) and abusive of company property (to drop glass bottles onto a concrete floor from that height is outrageous). Previously warned on 5/19/86 for unreported accident with truck and refusal to report or admit accident. Displayed same attitude on this occasion. Was recalcitrant and insolent when his conduct was challenged, just as he was on 5/19.

Boyd accepted the separation notice, but refused to sign it. He left the plant and has not worked for the Company since July 3.

b. *Analysis and conclusions*

The General Counsel argued that the Company issued written warnings to Boyd on April 3 and May 19, suspended him on May 16, and discharged him on July 3, all because of his union activity, and that the reasons proffered by the Company were pretextual. The Company seeks to avoid findings that its adverse actions against Boyd were not in response to union activity or prounion sentiment, by showing that it punished Boyd in each instance because of job-related misconduct.

Under Board policy, where the record shows that the Company's hostility toward union activity was a motivating factor in a decision to take adverse action against an employee, the adverse action will be found to be unlawful unless the Company is able to demonstrate, as an affirmative defense, that it would have taken the adverse action even in the absence of the protected activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 402–403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982). Where it is shown that the business reasons advanced by the Company for its actions were a pretext—that is, that the reasons either do not exist or were not in fact relied upon—it necessarily follows that the Company has not met its burden and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084.

Boyd's union activity came to the Company's attention at the end of February, when it received written notification from the Union that he had become a member of its organizing committee. During the next 2 months, he openly handbilled for the Union on three or four occasions, just outside the plant.

The Company's initial hostile reaction to Boyd's union activity occurred in late March or early April, at the plant. Pedro threatened to lay Boyd off for distributing union badges at the plant, on company time. Pedro also prohibited Boyd from passing out union badges during work hours. The Company did not have any no-distribution rule prior to this confrontation with Boyd. Assuming that the rule itself was otherwise valid, its promulgation and enforcement specifically against Boyd's union activity showed that its purpose was not to maintain production and discipline. Instead, I find that Pedro's threat of layoff and his promulgation of the no-distribution rule were both aimed at inhibiting Boyd's handbilling. This attempt to restrain, coerce, and interfere with Boyd's union activity showed that the Company was annoyed by Boyd's open support for the Union. I also find that by this conduct, the Company violated Section 8(a)(1) of the Act. *Harry M. Stevens Services*, 277 NLRB 276, 282 (1985).

During the same encounter, Pedro ordered Boyd to remove a union badge he was wearing on his uniform and told him not to wear it on his Pepsi-Cola uniform again. In his remarks to Boyd, Pedro did not give any business reason for requiring removal of the union badge, while engaged in general labor at the Norton plant. Nor did Pedro do so in his testimony before me. Here, again, Pedro showed that Boyd's overt support for the Union was an annoyance. I also find that by requiring Boyd to remove a union badge from his uniform, the Company violated Section 8(a)(1) of the Act. *Overnight Transportation Co*., 254 NLRB 132, 133 (1981).

The Company again showed its hostility toward Boyd's insistence on handbilling near the plant, when Pedro met him at the Norton plant's timeclock on April 3. In an effort to thwart Boyd's union activity, Pedro invoked the Company's unlawful prohibition against employees wearing Pepsi-Cola uniforms in public places while engaged in union activity. Pedro warned, in substance, that if Boyd handbilled for the Union in his Pepsi-Cola uniform again he, Pedro, would lay him off. By Pedro's enforcement of the regulation, which I have found violative of Section (a)(1) of the Act, the Company again violated that provision of the Act. *Mack's Supermarkets*, 288 NLRB 1082, 1100 (1988).

Later, that same day, the Company disciplined Boyd by issuing a correction notice to him. The notice stated that Boyd had violated a rule or regulation and specified that he had participated ''in public demonstration in uniform.'' The notice also warned that the Company would dismiss Boyd for the next incident of misconduct. Absent was any reference to union activity or handbilling.

The circumstances in which the Company issued the correction notice to Boyd leave no doubt as to its motive. Earlier on the same day on which the Company issued the correction notice, Pedro had verbally disciplined Boyd for handbilling outside the Norton plant, in his Pepsi-Cola shirt and hat. There is no showing in the record before me, that

prior to April 3, Boyd participated in any other public activity in his uniform which could be characterized as a ''public demonstration.'' Thus, I find that it was Boyd's handbilling for the Union which provoked the Company into issuing the correction notice. I also find that the Company's resort to the characterization of the handbilling as a ''public demonstration'' was an attempt to escape a finding by the Board that the correction notice was an unlawful reprisal. However, the record leaves no doubt that the quoted words were a euphemism for his open demonstration of support for the Union. Thus, I find that the reason for disciplinary action stated in the correction notice was a pretext and that the real reason was Boyd's handbilling for the Union. Accordingly, I find that by issuing the correction notice, with its warning of discharge, the Company violated Section 8(a)(3) and (1) of the Act. *E.R. Carpenter Co*., 284 NLRB 273–276 (1987).

Boyd's union activity was the subject of discussion, one or two evenings later, on April 4 or 5, when he and Supervisor Jerry Ryan met at dinner. Boyd admitted that he had offered a union signature card to a company supervisor in the Norton plant's breakroom. Ryan's immediate response was to scold Boyd for soliciting the signature. I also find that the unmistakable message in Ryan's remarks was that Boyd had better stop voicing support for the Union and soliciting signatures on its behalf lest the Company fire him. Ryan also said he had heard that Boyd and employees Rasnake and Baker would be fired. Ryan summed up by urging Boyd to abandon the Union for the sake of his job. Ryan's remarks were but another manifestation of the Company's hostility toward Boyd's union activity. I also find that the Company, by Ryan's repeated warnings of discharge in the context of his attempt to discourage employee union activity, violated Section 8(a)(1) of the Act. *Link Mfg. Co*., 281 NLRB 294, 297, 298 (1986).

The Company's unlawful threats and warnings in April did not convince Boyd to abandon the Union. Indeed, as late as July 3, Boyd told Huck Hunnicutt that he had attended a union meeting on the previous evening. The General Counsel contends that the Company used the incident on May 16 to punish Boyd for supporting the Union. The Company argues that it disciplined Boyd only for the reasons set out in the correction notice of May 19. The Company's previous treatment of Boyd, his continued loyalty to the Union, and the timing of this correction notice while the organizing campaign was on, presented strong evidence that his layoff and the correction notice were unlawful reprisals.

Analysis of the correction notice's contents suggests that the Company was anxious to inflate the gravity of Boyd's alleged misconduct. Thus, the correction notice stated that Boyd ''[h]ad been previously warned for reckless operation of a forklift and prohibited from operating same in future because he said he didn't see person he almost ran over.'' However, I find from Roy Almaroad's testimony that in late 1985, he stopped Boyd from operating forklifts because of poor vision. Absent from Almaroad's testimony is any reference to a warning for reckless operation of a forklift. Nor is there any showing that the Company treated the forklift problem as a disciplinary matter, when it first arose.

Indeed, I find from Almaroad's testimony, that the Company originally treated Boyd's faulty operation of forklifts only as a manifestation of a disability. According to Almaroad's credited testimony, ''on a couple of occasions,'' Boyd had not seen people walking in the plant, as he operated a forklift. Fearing that Boyd would hit someone, Almaroad prohibited him from driving forklifts. It was not until the correction notice dated May 19, that the Company treated this precautionary order as a disciplinary warning.

Moreover, the Company did not claim, nor did the record show, that Almaroad's prohibition included Boyd's operation of trucks in and around the Norton plant. Boyd's operation of a company truck had nothing to do with Almaroad's prohibition. The addition of this irrelevant afterthought to the scolding Boyd had suffered on May 16, evidenced the Company's fear that his accident on that date might not be perceived as sufficient reason for a correction notice and an early dismissal from work.

In light of the Company's earlier unfair labor practices against him, the contrast between the treatment it accorded Boyd in late 1985, and that which it inflicted on him in May, provided significant evidentiary support for the General Counsel's contention. Thus in late 1985, when there was no union activity at the Company's Norton plant, at least twice, Almaroad observed Boyd operating a forklift in a manner dangerous to people walking through the plant. Yet, the Company did not punish Boyd for that conduct. However, in May, while the union campaign was on, and after Boyd had shown Pedro that he was a union activist, a scrape and a one-eighth-inch-deep dent on the side of an automobile precipitated an immediate suspension for the remainder of Boyd's workday and a written warning.

The Company argued that the record did not show that Boyd suffered disparate treatment for his misconduct of May 16. I do not agree.

In support of its position, the Company provided evidence showing the punishment it imposed on five employees for driving accidents. Thus, the Company showed that in June, it discharged employee Evans for insubordination and carelessness. The separation notice, received in evidence, recited that he had been reckless and abusive to company equipment and had threatened a physical attack upon Roy Almaroad. A written warning issued to employee Steve Philpot in January warned of discharge if he again drove a forklift in an ''unsafe manner.'' In May, the Company issued a correction notice to employee Howard Pickett for his unsafe driving of a forklift in the syrup room. The notice, received in evidence, reported that this conduct broke a safety rule and warned of discipline or dismissal if Pickett drove a forklift into the syrup room again. Incidentally, the correction notice reported that Pickett's action knocked over a 5000-gallon sugar tank. I also find from Roy Almaroad's full and forthright testimony that there were 700 to 800 gallons of corn syrup in the tank at the time, of which 300 to 400 gallons were lost. In June, the Company issued a correction notice, which included a warning of discharge, to Chris Dutton for reckless operation of a scrubber, when he ran into a pallet of cans. Finally, the Company showed that it had issued a warning to employee Jimmy Pitts in October, for driving a forklift carelessly while stacking pallets. Pitts' careless driving pushed out a section of wall approximately 24 inches. The record did not disclose whether any of the five employees filed an accident report. Nor was there any showing that the Company laid off Philpott, Pickett, Dutton, or Pitts immediately after it learned of their asserted misconduct.

Far from assisting the Company's defense, the five incidents presented to show that Boyd did not suffer disparate treatment, showed that he did. Unlike the five employees named in the preceding paragraph, Boyd's alleged misconduct did not impact upon company property and did not cause consequential damage. There was no showing that Pedro could not use his auto after Boyd scraped some of its paint off and inflicted a one-eighth-inch dent on its body. Nor did the Company show the cost of repairing that damage. Further, the correction report issued to Boyd on May 19, did not characterize his alleged misconduct as ''reckless.'' That term appears for the first time in the Company's posthearing brief. Nor did that correction notice claim, as did the Company's brief, that Boyd lied about his responsibility for the damage to Pedro's auto. Finally, unlike Boyd, there was no showing that any of the same five employees suffered a layoff immediately after the Company satisfied itself of their culpability. Yet as soon as Pedro had completed his investigation on May 16, and had satisfied himself that Boyd had damaged his auto, he sent Boyd home.

In sum, I find that the Company seized upon the damaging of Pedro's auto, Boyd's neglect to file an accident report, and his denial of responsibility for it, as a pretext for punishing a known union activist. I further find the Company violated Section 8(a)(3) and (1) of the Act when it sent him home on May 16, and, again, when it issued a correction notice with its warning of further discipline on May 19.

The amended consolidated complaint alleged that the Company also violated Section 8(a)(3) and (1) of the Act by discharging Bobby Boyd on or about July 3. The record shows that on July 3 George Hunnicutt Sr. decided to discharge Boyd, that he ordered Pedro to do so, and that Pedro prepared the separation notice, which Roy Almaroad handed to the employee on that same day. The Company defended the decision to discharge, urging that it was a lawful response to Boyd's misconduct on that day, which included abuse of Company bottles, recalcitrance, and insolence.

There can be little doubt that on July 3 George Hunnicutt Sr. was fully informed of Boyd's sentiment toward, and activity on behalf of, the Union. On February 28, the Company received a letter from the Union which included a list of employees who had volunteered to help in the organizing campaign. Boyd's name appeared on that list. George Sr.'s testimony showed that he soon became familiar with that letter. The record showed that George Sr., as company president, was active in its management. He kept a watchful eye on its Norton plant. George Sr., Huck, and Pedro were all concerned about the Union's campaign and the union activity of the Company's employees. They showed this concern by their active opposition to the campaign. The record also shows that George Sr. and Pedro conferred on important matters, such as the installation of the television system and Boyd's discharge on July 3. I also find it likely that when Huck worked at the Norton plant during the union campaign, he had contact with Pedro and George Sr. From these circumstances, I find that Huck and Pedro kept their father, George Sr., informed of whatever they knew of Boyd's union activity.

The record reflects George Sr.'s opposition to the Union. Five days before the Union sent its letter announcing that Bobby Boyd was one of its active supporters, George Sr. signed and issued an antiunion letter to his employees. As found above, on February 24, George Sr. showed his interest in his employees' union activity, when he violated Section 8(a)(1) of the Act by telling employee Vivian Rasnake that he knew she had attended a union meeting and had talked to a union representative. On that same day, George Sr. exhibited hostility toward his employees' union activity, when he told Rasnake that he equated union support with disloyalty to him and voiced an implied threat of economic reprisal if she chose the Union. A further instance of George Sr.'s willingness to resort to unfair labor practices to squelch union activity among his employees was his decision to install a television surveillance system at the Company's Norton plant in March and April.

George Sr.'s hostility toward the union organizing campaign and its employee support had an ample target in Bobby Boyd. There can be little doubt that Bobby Boyd's handbilling just outside the plant in his Pepsi uniform, and his distribution of union badges inside annoyed Pedro and George Sr. Indeed, as found above, in early April, after Boyd had offered a union card to a supervisor in the Norton plant's breakroom, Supervisor Ryan warned him of discharge if he continued to talk about the Union. This warning suggested that the Company's higher management was more than annoyed by Boyd's union activity.

Soon after Boyd's arrival at work on July 3, Huck Hunnicutt came to his workstation and asked if he had attended a union meeting on the previous evening. Boyd answered yes. Within a few hours George Sr. directed Pedro to discharge Boyd. The timing of the discharge so soon after Boyd's encounter with Huck, by itself, was sufficient to arouse at least a suspicion of unlawful motive. However, given the evidence showing George Sr.'s prior knowledge and strenuous opposition to his employees' union activity, this interrogation, which I find violative of Section 8(a)(1) of the Act, and the timing of the discharge provided a prima facie showing that Boyd's persistence in supporting the Union provoked George Sr. into getting rid of him.

The Company sought to show that it discharged Boyd because he engaged in willful misconduct in his treatment of bottles and was ''recalcitrant and insolent when his conduct was challenged, just as he was on 5/19.'' However, review of George Sr.'s testimony cast doubt on the explanation recited in the notice of separation which Pedro prepared. Granted that Pedro accurately portrayed his father's description of how Boyd treated the bottles. However, the assertion that Boyd was recalcitrant and insolent on July 3, to the same degree as he was on May 19, is unfounded.

First, I note that George Sr.'s testimony did not even suggest that Boyd was insolent or recalcitrant during their encounter on July 3. Nor was there any showing from Pedro's testimony that he witnessed any such misconduct after he came upon his father and Boyd on that date. Nor did the correction notice, dated May 19, report insolence or recalcitrance. Here, as in that correction notice, the Company, in an effort to mask its actual motive for punishing Boyd, has exaggerated the extent of his asserted misconduct.

According to George Sr.'s testimony, he was ''a little infuriated'' by what he perceived as Boyd's intentional and willful attempt to break bottles, and reacted by instructing Pedro to discharge him. According to Pedro, his father thought of the Company's bottles as his ''crystal.'' To show that Boyd's punishment was an instance of its even-handed

treatment of employees who mishandle bottles, the Company introduced into evidence a correction notice, drafted by Pedro, and dated August 19, which it issued to Roy Almaroad's son, Brian, for throwing a case containing three or four 2-liter plastic bottles from the top of a palletizer. The notice shows that the Company issued it for ''Improper Conduct'' and for ''Breaking a Rule or Regulation.'' The explanation of the Company's reason for issuing the corrective notice originally read as follows:

> Was clearing jamb on 2-liter palletizer. Threw damaged cases down onto floor to get them out of the way. Most of bottles in those cases were undamaged. Threw 3 or 4 cases down. Distance from top of machine is approximately 10 feet. This is destruction of property. Should have handed cases down to another worker.

In the portion of the correction notice form set aside for: ''Type of corrective action given,'' Pedro wrote:

> WRITTEN WARNING. At best, this is very poor judgment and disregard of company property rights. At worst, this is wanton destruction of property. WILL BE DISCHARGED IF THIS IS REPEATED. SUSPENSION UNDER CONSIDERATION. WILL ADVISE.

After Pedro completed the correction notice, he spoke to Bryan and learned that three or four bottles were involved in the incident. Pedro immediately wrote ''bottles'' over the typed ''cases'' only after ''3 or 4.'' Everywhere else on the document, Pedro left ''cases'' unchanged.

Focusing on the punishment which Pedro inflicted on Bryan Almaroad, I note that it mattered not whether the misconduct involved three or four cases or three or four bottles. For, upon discovering that bottles rather than cases were involved, Pedro did not rescind the correction notice with its warnings of possible suspension immediately, and of discharge for a repetition of the asserted misconduct. Thus, it appears that as of August 19, George Sr. and Pedro considered the throwing of bottles to be serious misconduct, but not serious enough to warrant immediate discharge. This raises the question of why George Sr. insisted on discharging Boyd for dropping a case of bottles ''from waist-high.''

Pedro's attempt to explain the difference between Bryan's treatment and that inflicted on Boyd does not withstand scrutiny. First, according to Pedro, Bryan did not suffer discharge because the incident ''involved 3 or 4 bottles of merchandise instead of a caseless [sic] than a full case.'' However, as pointed out above, when Pedro filled out the notice showing that three or four cases had been thrown, there was only a threat of discharge for a repetition of the asserted conduct. When Pedro discovered his error, he did not change the corrective action portion of the correction notice. This failure to mitigate the punishment suggested that Pedro and George Sr. were primarily concerned about the mishandling of bottles, quantity of destruction. However, in attempting to justify the harsher treatment accorded Boyd, Pedro drew attention to the fact that glass bottles cost $6 to $8 per case empty while the plastic bottles abused by Bryan cost about $3 per case. The contrast between Pedro's conduct and his testimony about ''crystal'' cast doubt on his credibility as he attempted to explain the disparity between Bryan's punishment and Boyd's.

Comparison of the language Pedro used in recording the reasons for disciplining Boyd and Bryan with his testimony before me, suggested that he was exaggerating the seriousness of Boyd's conduct and minimizing Bryan's. Pedro testified that Bryan was contrite and provided an explanation showing that he had acted to keep production going. According to Pedro, Bryan had shown poor judgment, but had acted to help production. Pedro also insisted that Bryan had not ''engaged in any willful conduct.'' In contrast, the separation notice issued to Boyd on July 3 stated that his dropping of the case of bottles was ''overt and willfull [sic] misconduct.'' In this context, the normal definition oi ''willful'' is ''done deliberately.'[25] Thus, according to Pedro, when Boyd dropped a case of empty bottles over the dock floor ''from waist high,'' that was deliberate misconduct however, when Bryan threw three or four bottles to the plant floor from a platform, 10 feet above, as described in the correction report, that was not deliberate misconduct.

On direct examination, Pedro sought to correct his distorted interpretation. Contrary to what he had written on August 19, he testified that Bryan had dropped the 2-liter plastic bottles. When he testified about the difference between Boyd's conduct and Bryan's, Pedro asserted that Boyd ''just threw the bottles on the floor.'' According to the separation notice Pedro prepared on July 3, Boyd dropped the bottles.

Comparison of Boyd's separation notice with George Sr.'s testimony before me also shows that, between July 3 and the hearing before me, the Company's president embellished the account he had given to Pedro on the earlier date. According to Pedro's explanation on the separation form, his father saw Boyd ''drop a case of empty bottles onto dock floor from waist-high.'' Pedro also reported that this ''constitutes overt and willfull [sic] misconduct.'' George Sr. testified that he ''saw Bobby [Boyd] take this case of thirty-two ounce bottles and absolutely slam them down on the floor.''

In a further effort to show aggravation, George Sr. testified that ''it appeared to [him] that [Boyd] was trying to infuriate me in handling that merchandise in that rough manner.'' At another point, George Sr. went further, he testified that he became ''a little infuriated about what [Boyd] was doing because it appeared to me that he was purposely, intentionally, and willfully attempting to break those bottles and I believe that he had in mind just to antagonize me doing it.'' This testimony portrays malice on Boyd's part which was absent from the separation of employment form which Pedro drafted 20 after obtainiLng his fathers account of the incident. However, I fail to see how Boyd could have intended to antagonize George Sr. For, Boyd was working with his back toward the elder Hunnicutt, as the latter advanced toward the dropped pallet. This attempt to camouflage the real reason for George Sr.'s fury on July 3, dealt a fatal blow to George Sr.'s credibility and the Company's attempt to rebut the evidence supporting the General Counsel's contention.

Had Boyd not been a persistent union activist, I have no doubt that on July 3, George Sr. would have scolded, or given a correction notice to, this longtime employee for mishandling a case of glass bottles. However, I find that George Sr.'s fury, and his threat of physical harm, when he raised his cane as if to strike Boyd did not come from the mishandling of bottles.

[25] *Webster's Seventh New Collegiate Dictionary* p. 1021.

Instead, I find from all the evidence recited above, that George Sr.'s great hostility arose from Boyd's insistence on supporting the Union. This hostility motivated George Sr. to seize upon the dropped case of bottles as pretext for ridding the Company of an annoyance. I further find that by discharging Boyd because of his union adherence and support, the Company violated Section 8(a)(3) and (1) of the Act. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I also find that by brandishing his cane, in this context, as if he intended to strike Boyd, George Sr. was giving vent to his strong feeling against Boyd's union activity, and thereby violated Section 8(a)(1) of the Act.

2. Johnny Waddell

a. *The facts*

The Company employed Johnny Waddell as a laborer for 3 years. Johnny Waddell first became involved with the Union in December 1985, when he, his son David, and two other employees met with an International representative of the Teamsters. On February 21, the Company received a letter from the Union announcing that a group of employees, including Johnny Waddell, would be assisting the Union's campaign. Waddell signed a union card, attended union meetings, openly campaigned for the Union outside the Norton plant, and obtained a fellow employee's signature on a union card.[26]

On June 19, Waddell suffered an attack of hepatitis while at work and was hospitalized until Monday, June 21. He returned to work on July 2, with a note from Dr. Charles A. Fulton, dated July 1. The note announced that Waddell had been under Dr. Fulton's care and could return to work on July 2. Waddell gave the note to Operations Manager Roy Almaroad. Almaroad accepted the note without comment. Waddell went to the breakroom briefly, punched in, and went to work on the loading dock, sorting empty bottles.

Pedro and Almaroad soon appeared on the loading dock. Pedro instructed Waddell to punch out and go to the breakroom. In the breakroom, Pedro said that because Waddell was employed at a food plant and had suffered hepatitis, he could not return to work until the Company had received a letter from a doctor. At Pedro's request, Waddell signed a statement authorizing release of medical information regarding Waddell's medical condition, and any treatment he had received during the last 5 years. Pedro took the signed release and left the breakroom.

Before leaving the breakroom, Waddell asked Roy Almaroad if another doctor's excuse would be necessary when he returned to work. Almaroad said, ''No,'' adding that the Company had replaced Waddell and that ''if we need you, we'll call you.'' The Company never recalled Waddell.[27]

By letter dated July 7, but sent on the next day, Pedro requested that Dr. Fulton send to him ''a letter indicating whether Mr. Waddell has a communicable disease which would interfere with his employability in a food plant such as ours.'' Pedro included copies of the medical records release which Waddell had signed on July 2. Dr. Fulton received the letter and its contents.

On July 11, the Company received a physician's certificate of health which Dr. Fulton had completed that same day for the Virginia Employment Commission (VEC), in connection with a claim for unemployment benefits which Waddell had filed on July 9. The completed form recited that Waddell had suffered from hepatitis ''A,'' but could now perform any work and had no physical limitations.

Also, on July 11, the Company received a form from the VEC, showing that Johnny Waddell had filed a claim for unemployment benefits. The form stated that Waddell was asserting that the Company had discharged him, and that his last workday had been June 25. The left-hand front side of the form and the first two lines of the right-hand front side had been completed. The remainder of the left-hand front side and the back of the form were to be completed by the Company. Pedro instructed his sister, Strawberry, who was responsible for payroll records, to hold the form until July 15, ''because by then, he will probably be back to work, and we will just tell them he is back to work and they will close the file.'' When July 15 arrived without word from Waddell, Pedro directed Strawberry to fill out the employer's portion of the VEC form.

On Pedro's instructions, Strawberry completed the form, indicating that the Company had given a definite return date to Waddell. However, in the space provided for that date, she wrote, ''[U]pon Doctor's Release.'' On the reverse side of the document, Strawberry rejected ''discharge'' and ''voluntary quit'' as reasons for Waddell's separation from the Company's employ. She checked the box next to ''other.'' In the space provided for remarks, Strawberry wrote:

> Mr. Waddell was off sick & has failed to supply a Doctors Release stating he is in satisfactory health to work in a food plant.

Strawberry mailed the form to the VEC on July 15.

Pedro telephoned Dr. Fulton's office on July 15, and was told that Fulton was out of town that week, on vacation, and would return on July 21. It was Pedro's intention to find out

[26] My findings of fact regarding Waddell's employment and union activity were based upon the uncontradicted testimony of Charles Moore and Johnny Waddell.

[27] While conflicts arose between Waddell's testimony and Pedro's regarding their confrontation on July 2, I accepted Waddell's version. In assessing the reliability of Pedro's testimony here, I noted his lack of respect for these proceedings. Pedro, who is a member of the Virginia bar, showed this disrespect by leaving the witness chair, without permission, to assist the Company's counsel during the argument of an evidentiary issue pertaining to the alleged discrimination against Waddell. However, the decisive factor in my assessment of Pedro's credibility, where Waddell was concerned, was my conclusion that his explanation of the Company's failure to reemploy Waddell did not withstand scrutiny. In later portions of my findings of fact, I have credited Pedro's uncontradicted testimony regarding Waddell, where documents corroborated it. In contrast to Pedro, Waddell seemed respectful toward these proceedings. Further, Waddell appeared to be testifying from his best recollection in a forthright manner. In sum, Waddell impressed me as the more reliable witness regarding his treatment at the Company's hands.

The Company argues that I should reject Waddell's testimony regarding Almaroad's remarks to him as he left the plant on July 2. In support of its position, the Company points to an inconsistency between Waddell's testimony and his sworn statement given to a Board agent before the hearing. Comparison shows that his testimony before me that Almaroad told him that the Company would call him if it needed him, was not included in his prehearing affidavit. However, when asked why this additional remark was absent from his affidavit, Waddell answered, apologetically, that he had forgotten it. Having found him to be a credible witness, I accepted this explanation. I also noted that although the Company examined Almaroad extensively, counsel did not give him an opportunity to contradict Waddell on this topic.

why he had not received an answer to his letter regarding Waddell.

On July 16, the Union filed the unfair labor practice charge in Case 5–CA–18210, one of the cases listed in the heading above, alleging, inter alia, that the Company had violated Section 8(a)(3) and (1) of the Act by discharging Johnny Waddell on or about July 2, to discourage employee support for the Union. The charge form carried the Union's name and address. The Company received a copy of the charge on July 21.

On July 21, Waddell came to Fulton's office with an insurance form and mentioned the need for some contact between the doctor and Pedro to enable him to return to work. Dr. Fulton completed the doctor's portion of the insurance form, stating that Waddell had been unable to work from June 19 until July 2, because of hepatitis. He immediately returned the insurance form to Waddell. Waddell was seeking benefits under an insurance policy providing for payment of installments on the purchase of a truck, in the event Waddell could not work because of illness.

Dr. Fulton did not return Pedro's call of July 15.[28] Instead, on July 21, he dictated a letter to Pedro, bearing in mind Waddell's need for clearance to return to work. The letter asserted that Waddell had completely recovered from hepatitis ''A'' and did not have hepatitis ''B.'' Dr. Fulton also declared that Waddell was not infectious and could safely work on foodstuff. The letter was prepared in final form, dated July 22, and mailed to Pedro on that date. Pedro received it on July 24. Dr. Fulton mailed a copy to Waddell.

On July 22 or 23, Dr. Fulton prepared a handwritten letter addressed: ''To whom it may concern'': The letter said, in substance, that Dr. Fulton had treated Waddell for hepatitis ''A,'' that Waddell had recovered, and that he could work on food without fear of spreading infection. Waddell received the letter at Dr. Fulton's office, after it was written, and took it to the VEC.[29]

The VEC scheduled a hearing on Waddell's unemployment compensation claim for July 24. I find from Waddell's and Vanover's testimony that Waddell visited VEC's office on that date. In light of that circumstance, I also find that during that visit, Waddell delivered to Vanover a copy of the handwritten release prepared by Dr. Fulton.

On July 24, either in the VEC office, or on the parking lot near that office, prior to the scheduled commencement of the hearing, Waddell offered a copy of Dr. Fulton's clearance letter, dated July 22, to Pedro. Pedro rejected the offer, saying he already had one. He did not offer to reemploy Waddell. The hearing did not take place. Waddell did not pursue his VEC claim further. [30]

On the afternoon of the same day, Waddell appeared at the Company's office with his insurance claim form to have the Company fill out the employer's portion. Pedro met him. Concealed inside Pedro's shirt pocket was a microcassette recorder. Unknown to Waddell, Pedro intended to record their conversation.

Pedro began by asking Waddell: ''John, how's come you never have brought us a doctor's release here in all this time?'' Waddell answered: ''Cause I never did get nary one from him, Pedro.'' Pedro then referred to the Dr. Fulton's letter to Pedro, dated July 22, and asked if Waddell received a letter from Dr. Fulton before that one. Waddell insisted that the July 22 letter, which he had received ''yesterday'' was the first. Pedro challenged Waddell, saying: ''Well now, the doctor claims he . . . he give you one earlier than that.'' Waddell denied having received such a letter. Pedro acknowledged that he had received a note ''on the little bitty piece of paper'' which Waddell had brought from Dr. Fulton on July 2. Pedro then insisted that Dr. Fulton had said that

[28] Pedro testified that on July 21, in a telephone conversation with Dr. Fulton, he learned that the doctor had given a written release to Waddell, but could not remember when. Pedro also testified that on the same date, he telephoned Sherry Vanover of the Virginia Employment Commission, who told him that Waddell had filed his claim on July 9, that she had a letter from Dr. Fulton in Waddell's file, and ''that she had received it the week before.'' According to Pedro, at his request, Vanover gave a copy of the undated, handwritten, clearance letter to the Company on the same day. Pedro also testified about a telephone call he made to Dr. Fulton's office on July 22, during which he learned about the doctor's letter of July 22. According to Pedro, he received that letter on July 24. I have credited this uncontradicted testimony, which was in part corroborated by Dr. Fulton's testimony showing when that letter was prepared.

However, Dr. Fulton, who testified in an earnest and candid manner, denied having any telephone conversation with Pedro regarding Waddell. I have, therefore, Further, company witness Sherry Vanover's credible testimony did not include any reference to a telephone conversation with Pedro regarding Waddell.

In an effort to cast doubt on Dr. Fulton's testimony, the Company (R. Br. p. 5) asserted that Waddell contradicted Fulton's denial of a telephone conversation with Pedro. The Company was referring to Waddell's testimony that on or about July 5, while he was visiting Dr. Fulton's office, the doctor told him that he had conversed with Pedro by telephone and had cleared Waddell, but that Pedro wanted a written clearance. However, in light of Pedro's letter of July 7 setting out the need for a clearance, without any reference to a phone conversation, and his testimony that he had not heard from Dr. Fulton as of that date, I have rejected this portion of Waddell's testimony.

My impression that he was less than a candid witness when testifying about his decision not to reemploy Waddell, together with the factors recited above, persuaded me to reject Pedro's testimony regarding conversations with Dr. Fulton, and a converstion with Vanover on July 21.

[29] I based my findings regarding the preparation of the two letters regarding Waddell on Dr. Fulton's testimony. In contrast with Sherry Vanover, who expressed uncertainty under cross-examination as to when her office received copies of these letters, Dr. Fulton seemed confident as he carefully testified about the sequence and timing of the two letters. Vanover cast serious doubt on her testimony during direct examination, when, on cross-examination, she testified that she could not recall when the handwritten letter came in. On redirect examination, she could not recall when the Company picked up a copy of the handwritten letter. I also noted that Vanover admitted that neither the VEC certificate of health form, nor the copy of Dr. Fulton's handwritten letter, which were in Waddell's claim file, had a time stamp showing when each was received at her office.

Waddell also seemed confused about the timing of the handwritten letter. Accordingly, I rejected his recollection of when he received that letter. However, as he seemed more certain about Dr. Fulton's earlier letter, and as the record supports his recollection of when and how he received it, I have credited Waddell's testimony that he received Dr. Fulton's letter to Pedro, dated July 22, by mail prior to July 24.

I have also credited Dr. Fulton's testimony regarding the manner in which Waddell obtained the undated, handwritten letter, which he prepared. Waddell seemed mnre uncertain than the doctor about how and when he had received that letter from Dr. Fulton. However, I find from Waddell's testimony, that he took the handwritten letter to the VEC, after receiving it at Dr. Fulton's office.

According to Pedro, he received the handwritten clearance letter on July 21, after Vanover told him about it. In an earlier footnote, I rejected his testimony about a conversation with Vanover on that date. (See fn. 28, above.) I have also found that Dr. Fulton did not prepare that letter until July 22, at the earliest. Accordingly, I have rejected Pedro's assertion that he received a copy of that letter on July 21.

[30] The testimony of Pedro and Waddell conflicted on where they were standing when the offer of the letter was made. I find it unnecessary to resolve this conflict. The remaining findings of fact regarding their meeting, the hearing, and Waddell's VEC claim were undisputed.

he had given Waddell ''another one.'' After Waddell uttered a negative sound, Pedro retorted: ''Because I called him, . . . here, . . . uh . . . two-three times.'' Waddell insisted: ''Well I swear that is the only one I got.'' Pedro again pressed Waddell, and the latter held his ground.

Pedro asked: ''Well what. . . . What is this thing there. . . . You got a . . . You owe somebody money and that's insurance on the loan?''

Waddell answered: ''Yeah, my . . . truck payment.''

Pedro said that the Company would fill in its portion of the insurance form to show that Waddell had last worked on June 19 and had not returned. Pedro added: ''Because that is the truth, we have to put the truth.''

Pedro asked if Waddell thought the Company had fired him. Waddell said he ''did not think that was true.''

Pedro pointed out that he had received something from the employment commission saying that Waddell had been discharged. Waddell replied: ''Well, I had to get me some kind of money.''

In further discussion, Waddell stated that he had not received any letter from the Company, saying that he had been replaced and had no job. He also conceded that he had not received any letter from the Company, saying that he had been discharged.

Finally, Pedro asked if the doctor had not ever given Waddell ''an excuse before the one dated yesterday, the 22nd day of July?'' Waddell answered: ''No, that is the only one. Like I said, I got that letter yesterday evening.''

On July 24 or 25, Waddell brought the Credit Life Insurance Company disability form back to Finance One, the company which had financed his truck. Under the policy Waddell had with Credit Life, if he were disabled for 15 consecutive working days, the insurer would make installment payments on his behalf, from the first day he was unable to go to work, until his doctor released him to return.

Finance One's employee, Teresa Wright, reviewed Waddell's form and noted the absence of a date showing his return to work. She also saw that Dr. Fulton had released Waddell on July 2 and that the Company had written ''has not returned'' on its portion of the form. Wright asked Waddell why he was not working. He said he didn't know.

Wright telephoned the Company and asked for Strawberry Hunnicutt, whose signature appeared on the insurance claim form. When Wright asked why Waddell had not returned to work, Strawberry turned the phone over to Pedro. Wright asked why Waddell had not returned to work. Pedro answered, ''He's not resumed work.'' Wright repeated her question. Pedro repeated his answer. Referring to the insurance form, Wright said she could read that herself. She again pressed Pedro for an explanation.

Pedro answered:

> Look lady, I don't know if you're aware of this union situation here or not, but I don't want you as a witness to it.

Wright said all she wanted to know was if Waddell could go back to work. Pedro replied that Waddell hadn't brought ''his work excuse back.'' Wright reminded Pedro of the doctor's release Waddell had brought to the Company on July 2. Pedro repeated that Waddell had not brought a doctor's release. Wright responded: ''In other words, if he brings his doctor's excuse back, he can return to work.'' Pedro replied: ''That's the problem.'' At this point, the conversation ended.

Once off the phone, Wright told Waddell that all he needed to get back to work was a doctor's release. Waddell told her about his attempt to return to work on July 2. After Wright told him that he did not qualify for the insurance benefits he was seeking, Waddell departed.[31]

b. *Analysis and conclusions*

The Company's management first learned of Waddell's union activity on February 21, when it received a letter from the Union, listing him as a member of the organizing committee. Waddell also handbilled for the Union outside the Norton plant. Pedro's demonstrated interest in his employees' union sentiment and his daily involvement in the Norton plant's operation lead me to find that he was aware of Waddell's prounion sentiment and his union activity on and after February 21.

Prior to the arrival of a copy of the Union's unfair labor practice charge sheet, on July 21, the Company showed no hostility toward Waddell, which could be attributed to union animus. Neither Pedro, nor any other member of management, coercively interrogated Waddell, threatened him, or otherwise attempted to persuade him to abandon the Union. There was no allegation and no showing that Almaroad's statement on July 2, that the Company had replaced Waddell and would recall him when he was needed, violated the Act.

Contrary to Almaroad's remarks, as late as July 15, the Company showed that it intended to reemploy Waddell, as soon as his physician provided a written release stating that he was free of hepatitis. Thus, on July 2, and again on July 7, Pedro took steps to assist Waddell in obtaining a proper clearance letter from Dr. Fulton.

Even after Waddell filed a claim with VEC, on July 9, alleging that he had been discharged, Pedro remained benevolent toward him. On July 11, Strawberry had the VEC's Employer's Report of Separation and Wage Information form, showing Waddell's claim and his assertion that the Company had discharged him. Pedro told her to hold it until July 15, pending Waddell's probable return to work. Finally, when Strawberry filled the form out on July 15, she indicated that the Company had told him that he could return to work ''upon Doctor's release.''

However, on July 21, the Company received a copy of an unfair labor practice charge form, which alleged, among other violations of the Act, that the Company had discharged Waddell on July 2 to discourage employee support for the Union. The form showed that the Union was the charging party. I have no doubt, and find, that Pedro saw the copy of the Union's charge on the day it arrived.

The arrival of the Union's charge on July 21 brought another message to Pedro. It told him that Waddell went to the Union for help after Pedro turned him away from his job on July 2. More important, the charge form reminded Pedro that Waddell had allied himself with the Union. In view of Pedro's strong hostility toward the Union, these revelations undoubtedly raised his ire.

After July 21, Pedro's attitude toward Waddell became hostile. In contrast with his earlier efforts to facilitate

[31] I based my findings regarding Wright's conversation with Pedro on her forthright testimony, which Pedro corroborated in large part.

Waddell's reemployment at the Norton plant, Pedro did not offer reemployment when they met on July 24, or at any time thereafter. When he met Waddell, Pedro had already received Dr. Fulton's letter of July 22. That letter satisfied the Company's need for assurance that Waddell was free of hepatitis and could safely work on or near food. Instead, Pedro devoted himself to defeating the allegation that the Company had unlawfully discharged Waddell. In this endeavor, Pedro used Waddell.

The General Counsel contended that the Company violated Section 8(a)(3) and (1) of the Act on and after July 2, by refusing to permit him to return to work, and thus constructively discharging him. However, I find that the evidence did not sustain a prima facie showing that Waddell was entitled to reemployment prior to the Company's receipt of the release in Dr. Fulton's letter, dated July 22. The General Counsel did not challenge either Pedro's stated concern on and after July 2 about Waddell's hepatitis, or Pedro's insistence upon a doctor's release as a condition for reemployment. Waddell was not entitled to return to work for the Company until Dr. Fulton's release reached Pedro.

It was only when Pedro met Waddell on July 24 and did not offer to reemploy him, that a prima facie case of unlawful discrimination arose. For at that juncture, 3 days after a copy of the Union's unfair labor practice charge had arrived at his office, Pedro's attitude toward Waddell changed from benevolence to hostility. In light of Pedro's demonstrated hostility toward the Union, I find that Waddell's adherence to the Union was a motivating factor in Pedro's decision to withhold reemployment from him on July 24.

The Company asserted that it refused to reemploy Waddell because he was dishonest in dealing with Pedro and voluntarily quit. The key factor in the Company's explanation was Waddell's failure to give a copy of Dr. Fulton's handwritten release to Pedro. According to the Company, this omission and his untruthful denial that he had received the handwritten release showed that he was dishonest and did not want his job back. I find that this explanation does not withstand analysis.

That Pedro did not advise either Waddell, Finance One, or the VEC of these reasons on July 24, suggested that they were afterthoughts. On that day, Pedro had two chances to tell Waddell why the Company would not reemploy him, once when they met at or near the VEC's office, and later at the Company. On neither occasion did Pedro explain why, despite the arrival of a valid doctor's release, the Company was not reemploying Waddell. Moreover, if Pedro had offered reemployment, a refusal would have removed any doubt as to the latter's intention.

When Teresa Wright called to ask why Waddell had not returned to work, Pedro could have given her the reasons stated here. He chose not to. Before me, Pedro gave self-serving declarations, testifying that he withheld these reasons because of concern for Waddell's interests. However, I have found from Wright's testimony that Pedro voiced concern only about ''this union situation here,'' and the possibility that she might be ''a witness to it.'' Thus, Pedro's concern was the unfair labor practice charges resulting from the Union's organizing campaign.

Pedro testified that under Virginia law the Company would have been charged for the cost of Waddell's unemployment benefits. However, there was no showing that Pedro or the Company notified VEC that Waddell's claim was false. Instead, Pedro set about preparing a tape recording which would ultimately play a part in the Company's defense against an unfair labor practice charge.

A second factor casting doubt on the Company's explanation was Pedro's assertions that he had telephone conversations with Dr. Fulton or someone in his office about a handwritten doctor's release. In his conversation with Waddell, on July 24, Pedro asserted that he had called and spoken to Dr. Fulton two or three times, and that the doctor had told Pedro that he had given a doctor's release to Waddell prior to the release dated July 22. In his testimony, Pedro asserted that he had telephoned Dr. Fulton on July 21, and that the doctor said he had already written another release for Waddell to supplement the release which Waddell had presented on July 2. Pedro also testified that he called Dr. Fulton on July 22, ''spoke to one of his girls,'' who told him about a third release which he would quickly receive in the mail. However, I have found from Dr. Fulton's testimony that he never had a telephone conversation with Pedro about Waddell. Yet, on a tape, recorded without Waddell's knowledge, Pedro told him that there had been two or three such conversations. It was the very same tape which the Company offered, and I received, as an exhibit in these proceedings.

Pedro's surreptitious recording of Waddell's responses to Pedro's assertions that he had two or three conversations with Dr. Fulton and Waddell's admission that he was trying to get some money to pay installments due on his truck suggested an intent to improvise a pretext for the refusal to reemploy Waddell. Pedro's remarks to Teresa Wright later, that same day, about the Union and his fear that she was a potential witness, add support to that inference. For they came in answer to her quest for an explanation of why Waddell had not returned to work. They also show that Pedro had identified Waddell as a union supporter. Here was direct evidence of the unlawful motive behind the Company's refusal to reemploy Waddell.

Pedro's references to a second letter on the tape convinced me that he learned about Dr. Fulton's handwritten release, earlier on July 24, after a visit to the VEC. I found no credible testimony showing that Pedro knew about the handwritten release prior to that day. I also noted that Pedro did not mention that release to Waddell when they met at or near the VEC. It seems likely that Pedro visited the VEC office after Waddell had left a copy of the handwritten, undated release there, and after Waddell had offered a copy of Dr. Fulton's release, dated July 22 to Pedro.

Pedro testified, in substance, that when he learned about Dr. Fulton's handwritten release and noted that Waddell had failed to offer it to the Company, he, Pedro, decided to use the tape to investigate. However, instead of showing a copy of that release to the suspect and seeking an explanation, Pedro attempted to portray Waddell as a dishonest person for purposes of contemplated litigation. Nor did Pedro take the opportunity, which the tape presented, to offer reemployment to Waddell and thus put an end to the matter. Pedro preferred to contrive an explanation for his failure to reemploy Waddell.

The Company's claim that Waddell quit his job, is unfounded. According to the Company, Waddell absented himself from work for more than 3 consecutive days without presenting a proper medical excuse, and thus, under its pol-

icy, it considered him to have quit. In support of its contention, the Company pointed to testimony which, if credited, would show that Waddell had a handwritten clearance before July 16, and as early as July 11. However, I have found that Dr. Fulton prepared it on July 22 or 23. I have also found that at when the two first met on July 24, Pedro did not know that there was a handwritten clearance.

In any event, by July 23, pursuant to Waddell's authorization, which he provided on July 2, the Company had received a proper release from Dr. Fulton. On the following day, when Waddell offered a copy of this release to Pedro, he was attempting to satisfy the condition of reemployment which Pedro, himself, had set on July 2. Indeed, when Strawberry completed the VEC's Employer's Report of Separation and Wage Information on July 15, she indicated that the Company intended to reemploy Waddell ''upon Doctor's release.'' In sum, I find that the Company had no ground for believing that Waddell had quit.

I find from the foregoing, that the Company's explanation of its refusal to reemploy Waddell on and after July 24, was wholly pretextual. I also find, therefore, that the Company, by constructively discharging Waddell because he had allied himself with the Union, violated Section 8(a)(3) and (1) of the Act.

3. Boyd's and Waddell's shift changes

a. *The facts*

The Company's records show that from the 2-week pay period beginning on January 4, until the end of the 2-week pay period beginning on June 21, it assigned eight different starting times to Bobby Boyd, who was a laborer. From January 4 until March 14, his most frequent starting time was 6 a.m. From March 15 until March 28, his starting time was 3 p.m. From March 29 until June 20, Boyd's workday began at 9 a.m. on 25 days, at 11 a.m. on 18 days, at 10 a.m. on 3 days, and at 1 p.m. on 4 days. From June 7 until his discharge on July 3,[32] Boyd began work at 1 p.m. on 13 days.[33]

The Company's records show that, from January 4 until June 19, it assigned six different starting times to Johnny Waddell, who was a laborer. From January 4 until the 2-week pay period ending February 14, Waddell started his workday at 9 a.m. twice, at 11 a.m. 14 times, at 12 p.m. 7 times, and at 3 p.m. twice. From February 15 until April 11, Waddell's workday began at 3 p.m. 29 times, at 11 a.m. 3 times, at 12 p.m. once, and at 2 p.m. once. From April 12 until June 19, the Company's records show that Waddell's workday began at 9 a.m. 27 times, at 10 a.m. 4 times, at 11 a.m. 20 times, and at 1 p.m. 4 times. As found above, Waddell was hospitalized on June 19, and did not return to work at the Company, except for a brief time on July 2.[34]

The Company's records of starting times for six other employees, who were laborers, show that beginning on January 4, their starting times changed with varying frequencies during the year. The six employees included Terry Henderson, Gary Wells, Larry Blanken, John Baker, Allen Young, and Ray Kilgore. The Union did not list Wells, Kilgore, or Young as active supporters of its organizing campaign in the letters it sent to the Company in February and March. The Union listed Henderson, Blanken, and Baker in its letter to the Company, dated February 18.

b. *Analysis and conclusions*

I find that the General Counsel has failed to make a prima facie showing that Boyd's or Waddell's support for the Union was a motivating factor in the Company's changes in their starting times in 1986. The record shows that the Company changed the shifts of six other employees with varying frequencies during 1986. There was no allegation that the three prounion employees among the six suffered their changes because of their union sentiment or union activity. Nor was there any showing that the three employees, who apparently did not support the Union, received better treatment in the changing of their starting times. Finally, the credited evidence shows that the Company was changing Boyd's and Waddell's starting times during January and the first half of February, before the Union began identifying its supporters to the Company. Accordingly, I find it unnecessary to consider the Company's explanation of the changes in Boyd's and Waddell's starting times in 1986. I shall recommend dismissal of the allegations that by those starting time changes, the Company violated Section 8(a)(3) and (1).

4. The discharge and suspension of Terry Henderson

a. *The facts*

The Company employed Terry Henderson as a stacker or loader from November 1985 until March 20. On occasion, Henderson also sorted bottles. As a stacker, Henderson would load merchandise on a pallet according to a loadsheet. A loadsheet listed the beverages and quantities of each to be loaded on a delivery truck. When the load was assembled on a pallet, a forklift would move the loaded pallet into its assigned delivery truck. Allen Young was Henderson's immediate supervisor.

On February 6, Roy Almaroad issued a verbal correction report to Henderson for poor work performance. In the explanation section of the report, Almaroad reported giving Henderson a 3-day layoff ''for standing around & talking.'' He also reported that he had spoken to Henderson about this misconduct, and added: ''[I]t can not [sic] be tolerated

[32] The Company's summary of its payroll records shows that Boyd worked on 9 days during the 2 weeks beginning on July 5. However, it is undisputed that the Company discharged Boyd on July 3 and has not reemployed him since that date. The record offered no explanation for this apparent error in the summary. The General Counsel did not challenge the accuracy of the summary and the record does not disclose any other ground for doubting its reliability.

[33] Finding Boyd's testimony regarding his starting times to be confusing due to self-contradictions and unresponsive answers, I rejected it. Instead, I based my findings regarding changes in Boyd's starting time in 1986, on the Company's compilation of its uncontradicted payroll records.

[34] I have rejected Waddell's uncertain and scant recollection of his starting times in 1986, and when they changed, as a reliable source of evidence. Instead, I have relied on the Company's summary, except where it showed starting times for periods after June 20.

On direct and cross-examination, Bobby Boyd testified about changes in his starting time in 1985. Counsel for the General Counsel and Respondent's counsel were careful to focus Boyd's attention on his experience with starting time changes in 1985. However, on redirect examination, Boyd testified that all the changes he had previously mentioned occurred in 1986. Boyd went on to assert that prior to 1986, the Company had not changed his starting time. Boyd's contradiction of his former testimony came in answers to leading questions by counsel for the General Counsel. This repudiation of earlier testimony cast serious doubt on the reliability of his testimony regarding whether he experienced changes in starting time in 1985. Accordingly, I have not credited his testimony on that topic.

again.'' Almaroad did not include any warning as to punishment for repetition of this offense.

Henderson was a union activist. He signed a card for the Union and obtained signed cards from other employees. He attended four or five union meetings. Henderson was one of the members of the Union's organizing committee. The Union listed Henderson as one of its supporters in its letter to George Hunnicutt Sr., dated February 18, which the Company received on February 21.[35]

On February 21, a payday, Henderson went into the Norton plant's cafeteria to receive his check. Along with the check, the Company gave him an antiunion pamphlet. After Henderson had read the booklet, Roy Almaroad approached, and asked Henderson what he thought about the pamphlet's contents. Henderson fended off the question, saying that he would rather not answer it at that time. Henderson left the cafeteria to clock in and start work. As he was leaving, he threw the pamphlet into a trash can.[36]

Later, that same day, Henderson went to a loading dock at the Norton plant, looking for a loadsheet in one of the trucks. He was unsuccessful in his search. He began separating 10-ounce bottles. Upon finishing that task, he went to forklift operator Larry Blanken and asked him if he had seen the missing loadsheet. Blanken had not seen it.

Henderson went to another dock area and asked forklift operator Ricky McFarland about the loadsheet. At that point, Pedro's brother, Joseph, referred to in the record as Huck, grabbed Henderson's left elbow and discharged him. In substance, Huck said Henderson was loafing. Henderson denied the accusation, insisting that he was looking for a loadsheet. Huck did not respond.

Huck also accused McFarland of neglecting work and engaging in casual conversation. McFarland apologized and returned to work. Huck began to escort Henderson from the plant. Roy Almaroad joined them as they walked to the timeclock. Henderson sought and received permission to use a plant restroom. While in the restroom he overheard Almaroad ask Huck why he had fired Henderson. Huck answered that Henderson was interfering with the operation of forklifts. Henderson clocked out and left the plant.[37]

That same day, Huck issued a verbal correction report to McFarland for poor work performance. In a written explanation on the report, Huck described the misconduct as conversing with Henderson, when both should have been loading trucks.

Almaroad attempted to call Henderson on the following day and tell him that his discharge had been reduced to a 3-day suspension. Henderson was not at home, but his mother answered the phone. Almaroad told her of the reduced punishment and asked that Henderson report to his office on Monday morning .

By letter dated February 22, Roy Almaroad directed Henderson to report to him on the following Monday, at the Norton plant. The letter explained that the purpose of Henderson's meeting with Almaroad would be ''discussion and final resolution of your suspension yesterday by Mr. Joseph Hunnicutt of this company.''

On February 24, Almaroad issued a correction notice to Henderson for unsatisfactory work performance and suspended him for 3 working days. The explanation on the notice form was:

> Standing around & talking. This is the last warning. The next will be dismissal.

Almaroad also noted on the report that ''this is the second layoff for the same reason.''

b. *Analysis and conclusions*

The General Counsel contends that the Company discharged Henderson and then changed the discharge to a 3-day suspension to punish him for supporting the Union, and thus violated Section 8(a)(3) and (1) of the Act. The Company argues that Huck discharged Henderson for loafing and that Almaroad reduced this punishment to a 3-day suspension because the Union named Henderson as one of its organizers in its letter of February 21. Thus, according to the Company, it gave Henderson preferential treatment because of his union activity. I find, in agreement with the General Counsel, that the Company inflicted the discharge and the 3-day suspension on Henderson because it learned that he was supporting the Union.

On February 21, Henderson refused to answer Almaroad's question about what he thought of the Company's antiunion pamphlet. By that time, Henderson had aligned himself actively with the Union. Shortly after Almaroad's unsuccessful attempt to explore his attitude toward the Union, Henderson tossed the Company's pamphlet into a waste can. The exchange between Henderson and Almaroad regarding the pamphlet occurred in the Company's cafeteria, in the morning, as Henderson was picking up his pay, and shortly before

[35] The facts regarding Henderson's employment and union activity were not in dispute.

[36] My findings regarding the conversation between Almaroad and Henderson regarding the antiunion pamphlet are based upon the latter's uncontradicted testimony.

[37] Huck testified that 5 minutes after he had finished scolding Henderson for loafing, he caught Henderson standing with his arms folded, doing nothing. According to Huck, this second incident provoked him to tell Henderson to clock out and leave. According to Huck, when Henderson asked if he was being fired, Huck thought that Henderson was ''baiting'' him, and fired him. However, this testimony was uncorroborated. Almaroad's correction report of February 24 did not mention a second encounter between Huck and Henderson on February 21. Nor did Henderson testify about a second encounter with Huck.

Assuming that a second encounter occurred, as depicted in Huck's testimony, it would certainly have been a matter of sufficient gravity to have reached Almaroad's attention. Yet Almaroad said nothing about it either in his correction report or in his testimony. Henderson's credited testimony showed that when Almaroad asked Huck why he had fired Henderson, the answer was that Henderson had interfered with the operation of forklifts. Almaroad's testimony was that he based the correction notice of February 24 upon Huck's observation. Almaroad's testimony and the correction notice cast serious doubt upon Huck's testimony regarding a second confrontation.

Another basis for rejecting Huck's uncorroborated testimony was his apparent attempts to cast Henderson in an unfavorable light. On direct examination, when asked to recall his first discussion in 1986 with Henderson, regarding Henderson's work, Huck gratuitously testified about a 3-day layoff for loafing. Later in his testimony, Huck characterized Henderson's assertion that he had spoken to employee McFarland about a misplaced loadsheet as an argument. Finally, when testifying about the asserted second incident, Huck injected an exasperated tone as he quoted himself. My impression was that Huck was overdoing the exasperation. In contrast with Huck, Henderson testified in a frank, unsophisticated manner. I also noted that the content of the correction notice Henderson received on February 24 was closer to his version of what happened than it was to Huck's. Accordingly, I have credited Henderson's version of his encounter with Huck and Almaroad on February 21. I have also rejected Huck's testimony where it conflicts or is inconsistent with Henderson's.

he clocked in for the day's work. The waste can stood in the same cafeteria.

The Company's demonstrated interest in identifying union supporters among its employees, as shown by its resort of interrogation and surveillance, as found above, provided the motive for Almaroad's questioning of Henderson. Almaroad was using the antiunion pamphlet to test Henderson's attitude toward the Union. Henderson's balky retort was likely to arouse Almaroad's suspicion that he supported the Union. That suspicion was confirmed that same day, when the Union's letter arrived with Henderson's name listed as a member of the Union's organizing committee.

According to Huck's testimony, at the time he discharged Henderson, on February 21, Huck did not know that the Union was organizing and that Henderson, whom he knew only by the nickname ''Beaver,'' was listed on the Union's letter as an organizer. However, Huck did not deny that Almaroad's suspicion of Beaver's prounion attitude had been conveyed to him by the time he decided to fire that employee. Indeed, I find that Almaroad quickly communicated his suspicion to Pedro, who, in turn, passed the word to Huck.

The Company was the source of the antiunion pamphlets in the pay envelopes which Henderson and his fellow employees received in their pay envelopes on February 21. The record shows that the Company's management was concerned about the Union's campaign and its impact on the Company's employees. Therefore, I find that Almaroad acted under the Company's instructions when he asked Henderson for his opinion of the pamphlet.

In any event, the timing of the decision to fire Henderson suggested that Huck knew or strongly suspected that he supported the Union. For Huck made his decision on February 21, the same day on which Henderson refused to answer Almaroad's interrogation about the Company's antiunion pamphlet, and then threw it into a waste can.

The final ingredient in the General Counsel's prima facie case is the Company's demonstrated hostility toward employees who supported the Union. As shown elsewhere in this decision, the Company did not shrink from using either disciplinary warnings or suspensions, or discharges to punish union activists. The facts recited above, together with the Company's willingness to resort to discriminatory discharges, strongly suggest that its treatment of Henderson, including the substitution of the 3-day suspension for his discharge, was motivated by its desire to defeat the Union.

The Company argues that its treatment of Henderson did not violate the Act. According to the Company, Huck fired Henderson for misconduct, and Almaroad, upon learning that Henderson was on the Union's organizing committee, gave him preferential treatment by reducing the punishment to a 3-day suspension. I find that the record does not support the Company's contention.

Where an employer's explanation of its reason for discharging an employee is false, the trier of fact may reasonably ''infer that there is another motive.'' More than that, the trier of fact can ''infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to support that inference.'' *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966).

Here, I did not credit Huck's testimony that he discharged Henderson for continuing to loaf after Huck had directed him to return to work and not let it happen again. Instead, I find that Huck first seized upon the conversation about a loading sheet as a pretext for discharging Henderson. However, when he learned that Henderson was a union activist and after Almaroad had advised that the discharge was excessive punishment, Huck devised the second incident to provide a more credible explanation for his abrupt action. Huck was anxious to disguise the true motivation for his decision to rid the Company of a prounion employee.

Huck's conduct on February 21, demonstrated his desire to get rid of Henderson quickly. Of all the discharges alleged in these cases, Henderson's stands out as the one unaccompanied by a separation of employment form. Huck summarily discharged Henderson, and in the company of Almaroad, quickly escorted him to the plant entrance. This speedy disposition of Henderson suggests that Huck was very annoyed by the discovery that he supported the Union.

Nor do I find merit in the reasons Almaroad gave in the correction notice he issued to Henderson on February 24. Almaroad did not witness the incident which inspired this warning. Huck provided the report which Almaroad embodied in this correction report. According to Huck and the correction report, Henderson was ''standing around & talking.'' However, I find from Henderson's uncontradicted testimony that he was not standing around and talking without purpose.

Henderson was trying to perform his assigned task of loading a delivery truck with soda. As a preliminary step in that task, he was looking for a loadsheet, listing the items and quantities of each to be loaded on the truck. Henderson first asked forklift operator Larry Blanken if he had seen a loadsheet pertaining to a particular truck parked at the dock. Blanken said no. Henderson met forklift operator McFarland and asked the same question.

It was Henderson's question to McFarland which Huck seized upon as a pretext for discharge. Huck did not attempt to learn the topic under discussion. When Henderson protested that he needed a loadsheet, Huck did not answer. He did not dispute Henderson's asserted need for a loadsheet. Instead he summarily discharged him.

Almaroad was content to base his correction notice on the same incident Huck used for Henderson's discharge. Almaroad did not ask Henderson for his version of that incident. Almaroad's only concern was to reduce Henderson's punishment. Almaroad substituted a 3-day suspension and a warning for the discharge. The reason he gave for the lesser punishment was the same pretext Huck had used for the discharge. Huck wanted to rid the plant of a union supporter. Almaroad sought to inflict a lesser economic reprisal to discourage Henderson from supporting the Union.

In sum, I find that the Company first discharged Henderson on February 21, and then, 3 days later, reduced that punishment to a 3-day supension and a warning, all because he supported the Union. I further find, therefore, that by the discharge, and the suspension and accompanying warning of discharge, the Company violated Section 8(a)(3) and (1) of the Act.

As unlawful reprisals followed upon Almaroad's questioning of Henderson regarding the Company's antiunion pamphlet, I find that questioning to have been coercive. Accord-

ingly, I further find that by this interrogation, the Company violated Section 8(a)(1) of the Act.

5. The layoff of Carlos Fields

a. *The facts*

The Company has employed Carlos Fields as a laborer since August 19, 1985. His duties included scrubbing floors and cleaning up on the production line.

On February 18, the Company notified its managers, supervisors, and employees that on February 26 or 27, it would shut down its three production lines for maintenance, repair, and installation. The announcement stated that the expected duration of the shutdown would be 2 weeks. According to the notice, the Company would employ ''the most senior qualified men during this layoff to perform this work and any loading'' during the shutdown.

Ten days later, Operations Manager Roy Almaroad issued a written work assignment sheet to Carlos Fields for the workweek of March 3 through March 8. The assignment sheet stated that the Company had endeavored to divide the work evenly during the shutdown. Fields' assignment was to report for work Monday through Friday at 7 a.m. When Almaroad issued the assignment sheet, he advised Fields that he would be working on the bottle washer. The form stated that as the work schedule was complicated, the Company insisted that employees appear for work as assigned. The trading of shifts was prohibited. Absences would be excused only if it were impossible for the employee to report as assigned. George Hunnicutt Sr., Pedro, and Almaroad were the only persons who could excuse employees from reporting to an assigned shift. On February 28, the Company learned of Fields' union activity.

Fields actively supported the Union's campaign. He signed a union card and attended five or six union meetings. By letter dated February 25, the Union notified the Company that Fields was actively assisting its organizing campaign. The Company received the Union's letter on February 28.

On March 3, Fields reported for work at 7 a.m. He worked with Supervisor Robbie Mullins, and other employees, on overhauling a bottle washer. Fields' assignment was to assist in the removal of carriers from the washer. These components are 13 feet long, and weigh 200 to 300 pounds. They carry bottles through the washer. At about 3 or 3:30 p.m., Almaroad took Fields aside and asked him if he wanted his union card back. Fields said no. Almaroad turned and walked away. Fields went back to work.[38]

Shortly before 5 p.m., on March 3, Fields observed Roy Almaroad, Pedro, and George Hunnicutt standing and looking toward Fields and the other employees working on the bottle washer. The Hunnicutts called Supervisor Robbie Mullins over to them. After the four conversed briefly, Mullins went to Fields and announced that Fields would not be working on the following day. In quick response, Fields asked why the Company did not want him to work on March 4. Mullins answered that they were afraid that Fields might sabotage the bottle washer. Mullins instructed Fields to call Roy Almaroad on March 4, at 3 p.m.[39] Of the employees scheduled to work for the week of March 3, only Fields was laid off during that week.

Fields called Almaroad at the plant on the afternoon of March 4, and again on the following day. On March 5, Almaroad said he would get back to Fields. On the evening of the same day, Almaroad called Fields and instructed him to report back to work at 7 a.m. on March 6.

Fields returned to work as instructed. The Company assigned him to cleaning around the plant, including the vicinity of the bottle washer. Fields worked until 5 to 5:30 p.m., when Almaroad appeared and took him to a plant lab.

Once in the lab, Almaroad asked Fields if he was sure he did not want to get his union card back. Fields said yes. Almaroad asked Fields what the Union was going to do for him. The employee answered that ''nobody else is doing anything for us.'' The conversation ended, and the two left the lab. Fields worked on the following day.

b. *Analysis and conclusions*

On Friday, February 28, the Company notified Fields that it expected him to be working at the Norton plant from 7 a.m. until 5 p.m., daily, beginning on Monday, March 3. The schedule was complicated and the Company insisted upon strict adherence to it. Only Roy Almaroad, Pedro, and Hunnicutt were authorized to excuse employees from reporting for work. However, sometime on February 28, the Company learned that Fields was actively supporting the Union.

On Monday, March 3, Fields reported for work as scheduled. At midafternoon, Almaroad attempted unsuccessfully to pressure Fields into retrieving his signed union card. Within 2 hours of this encounter with Almaroad, and without any prior warning from the Company, Supervisor Mullins was laying Fields off. Mullins was acting under Almaroad's direction, and with the apparent blessings of Hunnicutt and Pedro. Of the employees scheduled to work that week, only Fields suffered a layoff. That Fields' loyalty to the Union provoked the Company, was strongly evidenced by the timing of this sudden and unheralded layoff, on the first day of a 6-day work schedule, which the Company had carefully

[38] In finding that Almaroad solicited the revocation of Fields' union card on March 3, and again, on March 6, I have rejected his denial that he ever engaged in such conduct. Instead, I have credited Fields' detailed account which he provided in a straightforward manner.

[39] According to Supervisor Mullins and employee Bobby Worley, Mullins said nothing about sabotage, when he laid Fields off on March 3. However, on direct examination, Mullins seemed reluctant to provide much in the way of details about the layoff and its origin. He testified that he laid Fields off because ''we did not need him.'' He did not disclose that Roy Almaroad, Hunnicutt, and Pedro were involved, or what Almaroad said, as he instructed Mullins to lay Fields off. Mullins' superficial testimony and my impression that he was carefully avoiding details cast doubt on his version of his remarks to Fields on March 3.

Nor did Worley impress me as a reliable witness regarding the content of Mullins' remarks to Fields at the time of the latter's layoff. According to Worley, Mullins told Fields only that ''he was not needed to show up on Tuesday.'' Worley heard these remarks as he worked on the bottle washer. However, Worley's reference to Tuesday is at odds with Mullins' and Fields' testimony that Fields was instructed not to return to work on Tuesday. This substantial inaccuracy and the circumstance that Worley overheard Mullins while working cast serious doubt on his version of the latter's remarks to Fields.

Fields seemed to be conscientious about providing his best recollection of the circumstances surrounding his layoff. In contrast with Mullins, Fields impressed me as the more straightforward witness. Fields satisifed me that he inadvertently neglected to include in his pretrial affidavit any reference to Mullins' remark about sabotage. Also, unlike Worley, Fields was not distracted as he listened to Mullins lay him off. Accordingly, I have credited Fields' uncontradicted testimony as well as his contradicted version of Mullins' remarks to him on March 3.

drawn. Mullins' response to Fields' request for an explanation also suggested that Almaroad, Hunnicutt, and Pedro equated union adherence with treachery toward the Company, and that they used a 2-day layoff to punish Fields for supporting the Union.

According to the Company, Fields suffered a 2-day layoff because he became superfluously late on the afternoon of March 3. That Mullins did not give that reason in response to Fields' question at the time of the layoff, suggested that the Company's explanation was an afterthought. Further analysis of this defense reveals its inadequacy.

According to Pedro and Roy Almaroad, on the afternoon of March 3, Hunnicutt noted that there were too many employees at the washer, after seeing Fields and another employee standing around, and ordered that someone be sent home. Pedro also testified that he told Almaroad to select the employee to be laid off. Almaroad testified that at the time he made his selection, the manual labor required to dismantle the bottle washer had been substantially finished, and Fields, as the least skilled employee present, was the logical choice.

However, the Company's explanation did not include any assertion that there was nothing else for Fields to do. He was primarily a cleanup man. Yet, neither Pedro, nor Almaroad, nor any other company witness presented any testimony touching on whether there was any cleanup work for Fields to do on March 4 and 5. Instead, I find from Fields' testimony that when he returned to work on March 6, the Company assigned him to cleanup work for the entire day. The abundance of such work only 3 days after Almaroad laid Fields off, raises the possibility that such work might have been available on March 4 and 5. The Company made no attempt to show that there was no cleanup work available to Fields on those dates. Thus, the Company did not sustain its burden of showing that it had no work, including cleanup work, for Fields during the 2 days of his layoff.

The Company's failure to show that there was no cleanup work for Fields on March 4 and 5 and the haste with which Almaroad selected Fields for layoff on March 3, imply that Hunnicutt, Pedro, and Almaroad seized upon the impending completion of the carrier removal as a pretext. Almaroad's further attempt on March 6 to pressure Fields into revoking his union card removed any doubt as to the Company's motive for laying Fields off on March 3. Almaroad was interested in seeing if the layoff had eroded Fields' adherence to the Union.

In sum, I find, contrary to Pedro's and Roy Almaroad's testimony, that they and George Sr. selected Fields for layoff to chastise him for refusing to revoke his union card. Accordingly, I further find, that by laying Fields off at the end of the workday, on March 3, the Company violated Section 8(a)(3) and (1) of the Act. I also find that by soliciting Fields to revoke his union card, the Company violated Section 8(a)(1) of the Act on March 3, and again, on March 6.[40]

[40] The solicitation on March 6 was not alleged in the amended consolidated complaint. However, as the facts regarding that incident were fully litigated at the hearing, my finding that this conduct violated Sec. 8(a)(1) of the Act is warranted. *St. Joseph Hospital East*, 236 NLRB 1450 fn. 5 (1978).

6. Kenneth Allen's suspensions

a. *The facts*

The Company employed Kenneth Allen from August 1985 until July, as a bottle inspector, a laborer, and as a forklift operator. Roy Almaroad was his supervisor. Allen's starting hourly wage was $3.35. In 1986, after February 21, the Company granted a merit increase to Allen, raising his hourly rate to $4.

Kenneth Allen actively supported the Union early in its campaign. He attended some union meetings, signed a union card, and was an in-plant organizer. The Union listed Allen as a member of its plant committee, in its letter to Hunnicutt, dated February 18, which the Company received on February 21. During the campaign, Allen expressed prounion sentiments to Almaroad during working hours, at the Norton plant.

On March 8, Kenneth Allen began work as a day-shift forklift truck operator on the Company's loading dock. However, during the morning, Pedro reassigned Allen to stacking pallets.[41] Employee James Fultz was working with Allen, stacking pallets. At lunchtime, Allen felt sick. In the afternoon, he left the plant without telling anyone, or seeking permission from Almaroad or any other supervisor, and visited a doctor. After leaving the doctor, Allen did not return to work for the remainder of the day.

I find from James Fultz' uncontradicted credible testimony, that he also left the plant on March 8, during his shift, without a word to anyone, and without seeking permission from Almaroad or any other supervisor. Fultz' reason for leaving was that he felt sick.

Fultz did not support the Union. His name had not appeared in any of the Union's letters as of March 10. Further, as of March 10, there was no evidence showing that the Company viewed Fultz as a union supporter. I found above that Almaroad asked Fultz if he had signed a union card. I find from Fultz' testimony that this interrogation occurred after March 9, the day he returned to work.

When Allen reported for work on the following morning, he was directed to the breakroom, where he found Fultz. Pedro and Almaroad soon appeared and conducted the two employees into the adjacent hallway.

Pedro asked the employees for an explanation of their conduct on the previous day. Allen and Fultz complied. Fultz offered to supply the Company with a doctor's excuse. Allen offered to do the same. Pedro and Almaroad accepted Fultz' offer, telling him to produce it on the following morning. Allen's offer was rejected. Instead, Pedro issued to Allen a correction notice which announced his 3-day suspension, without pay.

The correction notice gave improper conduct as the reason for its issuance. The written explanation of the offense was:

[41] Conflicts in testimony raised an issue of credibility regarding Allen's work assignment on March 8. Pedro testified that on March 8, Allen was assigned only to driving a forklift truck. Huck testified that Allen was the early crew forklift driver on March 8. Pedro was uncertain as to Allen's shift assignment on that date. Of the three, Allen impressed me as being the most conscientious witness, who was providing his recollection in a frank and forthright manner. Accordingly, I have credited Allen's testimony where it differed from Pedro's or Huck's.

''Left work without permission & without informing any supervisor at 2:41 p.m. on 3/8/86.''

Shortly before lunch, on April 9, Allen went into the breakroom to purchase a snack which he intended to consume at lunch. This was Allen's usual practice. This time, he bought two packages of fig newtons. As Allen entered the plant's production area, he had the unopened packages in his hand. Pedro met Allen and asked him what he had. Upon hearing that Allen had fig newtons, Pedro ordered him to the breakroom and told him to wait there. There was no showing that Allen ever opened the two packages of fig newtons.

Pedro returned shortly with Almaroad and the three went to Pedro's office. After a brief interlude, Almaroad issued a correction notice to Allen for an infraction of a company rule or regulation. The notice did not state the rule or regulation which Allen had allegedly violated. The explanation of the reason for the disciplinary action was: ''Had food products in the plant not eating. But did try to hide from Pedro.'' The correction notice announced the imposition of a 3-day suspension on Allen.

On February 2, 1981, the Company promulgated the following rule under Pedro's signature:

> Please be advised that effective immediately it is absolutely forbidden for employees to consume their lunch or any other food anywhere in the plant except the lunchroom. This applies to the loading crew as well as production employees.

The quoted rule has remained in effect since 1981.

b. *Analysis and conclusions*

There is ample evidence to support an inference that Kenneth Allen's union activity was a motivating factor in the Company's decision to suspend on March 9. The Company's action came 16 days after it had learned of Allen's membership in the Union's in-plant committee. Pedro's and Almaroad's demonstrated hostility toward other members of that committee pointed to the probability that they would see Allen's unauthorized absence on March 8 as an opportunity to punish him for supporting the Union. That Pedro and Almaroad summarily suspended Allen for 3 days and permitted Fultz to escape any disciplinary action gave impetus to that probability. Both employees had engaged in the same misconduct. Pedro and Almaroad knew Allen to be a union activist, but they knew nothing of Fultz' union sentiment. They accepted Fultz' offer to submit a doctor's note as atonement for an unauthorized absence. Allen also offered to submit such a note, but to no avail. Here was disparate treatment of a union supporter. Thus, I find that the General Counsel presented strong evidence that union activity was a motivating factor in Allen's suspension on March 9.

The Company insists that the General Counsel has failed to prove that Allen suffered disparate treatment at its hands. In support of its position, the Company presented Pedro's testimony regarding the separation of employee Ricky Hughes, who absented himself from work for 3 days without permission and without calling in. The Company also presented Almaroad's testimony regarding the termination of employee Leon Keys, who had been cautioned about leaving work without permission, and had been suspended for 3 days for a 2-day unauthorized absence, during which he did not call in. However, neither of these examples of misconduct were comparable to Kenneth Allen's. The Company further impaired its position by neglecting to explain the disparity between its treatment of Fultz and Allen on March 9.[42]

Almaroad's testimony, and the verbal correction report he issued to Fultz on May 7, support the General Counsel's case. Almaroad's testimony shows that he issued a verbal correction report, and counseled Fultz, on March 11. The correction report states that Almaroad issued it to Fultz for absenteeism and work performance. The explanation on the report states that Fultz ''was talked to about his work on inspection & his absenteeism & no Doc excuse.'' Almaroad's testimony reveals that he cosensidered Fultz' absence on March 8 as one of a series of absences, approximating 3 days, in a ''short period of time.'' Nevertheless the Company did not suspend Fultz or otherwise punish him. The record leaves to conjecture the import of the correction report's reference to ''no Doc excuse.''

Almaroad's testimony and Fultz' verbal correction report reinforce the General Counsel's already ample showing of disparate treatment. Allen's 3-day suspension without pay contrasts sharply with the counseling accorded Fultz 2 days later. Almaroad's testimony also showed several instances in which employees had as many as three unexcused absences from work, and had not called in. In each instance, Almaroad's disciplinary action consisted of talking to the employee and issuing a verbal correction report to him. Again, Kenneth Allen's 3-day suspension stands out as an exceptional disciplinary action.

The Company has not rebutted the General Counsel's showing that Kenneth Allen suffered disparate treatment. Nor has the Company cast doubt on the General Counsel's showing that Allen's union activity provoked the Company's issuance of a 3-day suspension to Allen on March 9. I find, therefore, that by imposing that suspension on Kenneth Allen, the Company discriminated against him, and, by so doing, discouraged membership in the Union. Accordingly, I further find that by suspending Allen on March 9 the Company violated Section 8(a)(3) and (1) of the Act.

One month after unlawfully suspending him for supporting the Union, the Company imposed similar punishment on Kenneth Allen. During the intervening month, Allen had not renounced the Union. Also, during that period, there were further instances of the Company's hostility toward union supporters. These included installation of a television surveillance system, unlawful restrictions on union activity, and other violations of Section 8(a)(1) and (3) of the Act. The timing of the second suspension so soon after the first, and the Company's persistent union animus provided strong support for the allegation that Allen once again had suffered an economic reprisal because of his support for the Union.

[42] Pedro testified that Kenneth Allen ''was suspended three days because he shut down the entire shift, he put us of [sic] business until we could find somebody to make good.'' Huck testified that he operated a forklift in place of the absent Allen on March 8. However, neither Huck nor the correction notice which he signed, and which Pedro issued to Allen, mentioned that the day shift had been shut down because Allen had left. I have also credited Allen's testimony that during the morning of March 8, Pedro relieved Allen of his forklift duties and reassigned him to stacking pallets, which task he performed until his departure, after lunch. Pedro's attempt to exaggerate the effect of Allen's absence eroded his credibility and suggested that he had some doubt about the sufficiency of the explanation for the 3-day suspension, on Allen's correction notice.

The Company relied upon the violation of, what it termed, ''a longstanding rule against food products in the plant'' as the only reason for Kenneth Allen's 3-day suspension on April 9. The rule as quoted above, clearly prohibits employees from consuming ''food anywhere in the plant except the lunchroom.'' At the time Pedro enforced this rule against Allen, the employee was carrying unopened packages of fig newtons and it was almost his lunchtime. Clearly, Allen was not violating the rule against consumption. Pedro did not take the trouble to inquire as to Allen's intentions or to warn him against opening the packages. Instead, Pedro sent Allen to the breakroom, found Almaroad, and then brought them to his office. Almaroad and Pedro issued a 3-day suspension and a warning of discharge for any further misconduct. The correction notice conceded that Allen's misconduct did not include eating.

However, in an effort to provide substance to the alleged infraction, Pedro and Almaroad asserted that Allen ''did try to hide from Pedro.'' But in his testimony, Pedro retreated from that assertion. Instead, he testified that Allen tried to hide the packages. According to Allen's testimony, Pedro saw the packages and asked what they were. Also, according to Allen, he had just made his usual prelunch purchase of a snack from a vending machine in the breakroom, and freely revealed its nature in response to Pedro. As Allen impressed me as the more candid witness, I have accepted his version of his initial encounter with Pedro on April 9.[43] Also, I have rejected Pedro's belated attempt to improve the excuse he and Almaroad had adopted on April 9 to justify the 3-day suspension.

The Company issued a 3-day suspension to employee Howard Pickett Jr. in September for having wrapped candy in the syrup room. However, I have also noted laxity in the Company's enforcement of its prohibition against consumption of food elsewhere in the plant. Thus, for example, I find from Allen's uncontradicted testimony that after April 9, he saw Almaroad drinking soda pop and eating a candy bar in the plant, behind the case room. I also find from employee John C. Baker's uncontradicted testimony, that during March, and through the year, until the time of the hearing before me, Almaroad repeatedly walked through the plant eating a cake or some other food item. However, Almaroad was quick to sign a 3-day suspension imposed on Kenneth Allen for carrying closed packages of fig newtons.

Having analyzed the proffered explanation and the relevant testimony and evidence, I find that the Company's defense of the second 3-day suspension of Allen does not withstand scrutiny. I also find that Pedro seized upon Allen's two packages of fig newtons as a pretext for punishing him for his obstinate support of the Union. Accordingly, I further find that by imposing a 3-day suspension on Kenneth Allen on April 9, the Company again violated Section 8(a)(3) and (1) of the Act.

[43] I have rejected Pedro's testimony that Allen refused to tell Pedro where he was going with the fig newtons. Allen's testimony shows that Pedro only asked him what he had in his hand.

7. Jeff Ritchie's discharge

a. *The facts*

The Company employed Jeff Ritchie as a production laborer from April 19, 1985, until it discharged him on March 21. Roy Almaroad was his supervisor.

Ritchie supported the Union's organizing effort, beginning in February. He signed a union card on February 22, and attended a few union meetings. The Union included Jeff Ritchie's name on the list of its employee supporters in a letter dated February 25, which the Company received on February 28.

As found above, Roy Almaroad made three attempts to pressure Ritchie into abandoning the Union. On March 1, after Ritchie had signed a card for the Union, Almaroad approached him at the plant and asked him if he had signed a union card. When Ritchie admitted that he had, Almaroad pressed him to revoke the card or face trouble and loss of his job. Almaroad offered to provide Ritchie with a revocation request if he would visit Almaroad's office, later in the day. Ritchie did not avail himself of Almaroad's offer that day.

Two or three days later, Almaroad attempted to persuade Ritchie to revoke his union card. Almaroad handed a revocation request to Ritchie just before the latter's lunchbreak. Ritchie did not use the form.

One or two weeks, later, Almaroad again questioned Ritchie about revoking his union card. Ritchie responded negatively. He said that he had not had time to do so. Almaroad never talked to Ritchie about his union card again.

On the afternoon of March 20, Ritchie was working on the production line, operating the caser and smoking a cigarette. Huck Hunnicutt saw Ritchie and ordered him to stop smoking. Huck scolded Ritchie, telling him that smoking was prohibited. Ritchie said he did not know such a rule was in effect.[44] Huck assured Ritchie that there was such a rule, and walked away. Ritchie completed his shift at 5:30 or 6 p.m., without further incident. Huck reported Ritchie's infraction to Almaroad. I find from Pedro's testimony that Almaroad was reluctant to discharge Ritchie for smoking on the production line.

There were significant issues of fact regarding the date and immediate circumstances of Ritchie's discharge. Almaroad's

[44] Huck testified that during their confrontation, Ritchie admitted knowing that smoking on the production line was prohibited. However, Ritchie contradicted Huck. According to Ritchie's testimony, when Huck suggested that he was not supposed to be smoking, Ritchie answered in substance that he was not aware of such a rule. Ritchie testified that until after his discharge, he was unaware that the Company had promulgated rules against smoking. He asserted that he did not read the posted material near the timeclock, which included the Company's rules against smoking and an announcment of the disciplinary policy toward violations of those rules.

Aside from a no-smoking sign in the syrup room, the Company did not use any other means to notify its employees of these rules and the applicable disciplinary policy. There was no showing that Almaroad or any other member of management told Ritchie about these rules and the punishment which would follow their violation.

Ritchie's plausible explanation of why he was not aware that his smoking violated a company rule, his respectful attitude toward the hearing, and his earnest effort to provide his best recollection persuaded me that he was a reliable witness. Thus, I find it unlikely that he told Huck that he knew that his smoking was misconduct.

testimony was that he confronted Ritchie and discharged him on March 20 for smoking in a production area. Almaroad also testified that he did so on Huck's report of seeing Ritchie smoke a cigarette in the production area. According to Almaroad, during the conversation preceding the discharge, Ritchie admitted smoking, conceded that he knew from seeing the posted rule that smoking in the production area was wrong, and that immediate dismissal was the appropriate punishment for this misconduct.

The initial infirmity in Almaroad's account of Ritchie's discharge arose from the presence of two discharge notices reflecting Ritchie's discharge for smoking. Almaroad testified that he issued a separation of employment for Ritchie during the day, on March 20. The explanation of the reason for Ritchie's discharge was as follows: ''Smoking in production area. Said he knew he was wrong & liked his job here & the people.'' The space designated for the employee's signature was blank. Also, according to Almaroad, he issued a second such form for Ritchie on March 21. The second form contained Ritchie's signature acknowledging receipt of wages. The explanation of the reason for Ritchie's discharge was: ''Smoking in production area.'' Almaroad did not account for the disparity between the two explanations. Nor did he explain how he arranged to obtain Ritchie's signature 1 day after he assertedly discharged him and yet did not get the employee's signature on the form bearing the date of the discharge.

The testimony of Ritchie and Assistant Operations Manager Robbie Mullins cast further doubt on Almaroad's account of Ritchie's discharge. Ritchie testified that Almaroad discharged him on the morning after Huck had found him smoking in the production area. Mullins, who witnessed the discharge, testified, without fixing a date, that it occurred in the morning. Ritchie impressed me as the more candid witness. Further, Mullins corroborated Ritchie's testimony on a substantial issue of fact. Accordingly, I find that Almaroad discharged Ritchie on the morning of March 21.

The discrepancies between the two separation notices, and Almaroad's untruthful testimony that he discharged Ritchie on March 20 persuaded me that Almaroad had contrived the separation notice bearing that date. This factor also cast serious doubt on the assertion on that separation notice that Ritchie ''said he knew he was wrong.'' That assertion flew in the face of Ritchie's sworn testimony denying knowledge of the Company's no-smoking rules.

Robbie Mullins also testified that Ritchie admitted that he had been wrong when he smoked. However, Ritchie steadfastly denied knowledge of the Company's rules against smoking as of the time of his discharge. On cross-examination, Ritchie conceded that he had made some misstatements in his direct testimony. Nevertheless, Ritchie was generally a conscientious witness, who seemed to be giving his recollection fully and frankly. In contrast, Robbie Mullins, who witnessed Ritchie's discharge, seem reluctant to provide details of it on direct examination by the Company's counsel.

I have determined that Ritchie was the most reliable of the witnesses who testified about his discharge on March 21. Accordingly, where his testimony conflicted with Robbie Mullins' or Roy Almaroad's regarding what was done or said by the participants on the morning of March 21 as Almaroad discharged him, I have credited Richie's testimony.

When Ritchie attempted to clock in on the morning of March 21, his timecard was missing. He soon met Operations Manager Roy Almaroad and Assistant Operations Manager Robbie Mullins. Almaroad had Ritchie's timecard. The two supervisors took Ritchie aside in an office. Almaroad said that it had come to his attention that on the previous day Ritchie had been caught smoking. Almaroad pointed out that Ritchie should not have been smoking and announced Ritchie's discharge. The discharge notice, which Almaroad issued, stated that Ritchie had violated company rules. The notice gave the following explanation of the reason for Ritchie's discharge: ''Smoking in production area.'' In his testimony before me, Pedro admitted that Almaroad had been reluctant to discharge Ritchie, and did so at Pedro's insistance.

This was the first time the Company had disciplined Ritchie. He asked ''Well, don't I even get a chance or a warning or nothing?'' Almaroad replied no, adding that he had been told to let Ritchie go. Robbie Mullins joined in the discussion, pointing out that this was Ritchie's ''first time'' and suggesting that a warning or some other alternative to discharge would be more appropriate. Almaroad answered: ''No, he's got to go.''

Ritchie was not aware of any company rule against smoking. From the beginning of his employment by the Company, until March 20, Ritchie had observed employees smoking freely at the plant. He had indulged in the practice, without interference from supervision.

On an occasion following Ritchie's discharge, employee Ernest Delph was working on the production line with employee Jamie Fultz. Both Delph and Fultz were smoking cigarettes as they worked. Roy Almaroad approached them and instructed them to get up and clean up. After a brief interlude, Almaroad returned to Delph and asked him if he had been smoking. When Delph said yes, Almaroad suggested that he and Delph start for Pedro's office. When they had gone about half way, Almaroad stopped and asked Delph why he had been smoking. Delph replied that he had not had a cigarette since lunchtime. At this, Almaroad asked Delph if he knew that Almaroad had gotten rid of Jeff Ritchie for smoking. Delph answered yes. Almaroad said he would not discharge Delph, and told him to get back to work. Nor did Almaroad discharge Jamie Fultz.

In a letter dated March 20 and received by the Company on March 24, the Union added Ernest Delph to the list of employees actively supporting its organizing effort among the Company's employees. Jamie Fultz' name did not appear on any of the Union's letters to the Company. The record does not show whether the Company was aware of Delph's union sentiment at the time Almaroad caught him smoking.

b. *Analysis and conclusions*

The General Counsel contended that the Company violated Section 8(a)(3) and (1) of the Act by discharging Ritchie because he refused to retrieve his signed union card. The Company argued that record did not support the General Counsel's contention. Instead, the Company urged that the evidence showed that it discharged Ritchie because he violated a prohibition against smoking in production areas.

On March 1, 1 day after the Company received word of Ritchie's active support for the Union, Almaroad asked him if he had signed a union card. When Ritchie said he had,

Almaroad pressed him to retrieve the card from the Union. Almaroad also threatened Ritchie with discharge if he did not revoke the union card. Ritchie did not revoke his card.

Two or three days later, Almaroad asked Ritchie about his union card. Ritchie said he had not sent the revocation form to the Union. Later, that same day, Almaroad went out of his way to make one available to Ritchie. Yet Ritchie remained steadfast. One or two weeks after presenting Ritchie with the revocation form, Almaroad asked him about his union card. Ritchie had not used the form and had not revoked his union card.

Less than 1 week after he learned that Ritchie had not mailed the revocation form to the Union, Almaroad discharged him. Almaroad was reluctant to discharge Ritchie, and did so under pressure from Pedro.

There can be no doubt that on February 28 Pedro learned that Ritchie was an active union supporter. Given Pedro's demonstrated interest in discouraging employee support for the Union, it was likely that he prompted Almaroad to encourage Ritchie to abandon the Union. A few days before March 20, Almaroad had learned that Ritchie was steadfast in his support for the Union. Also, by the morning of March 20, I find that Huck had learned from his brother, Pedro, and from Almaroad, that Ritchie would not revoke his union card. Once again, there was the likelihood that an employee's insistence on supporting the Union had stirred up their hostility.

Ritchie's smoking while working on the production line provided the Company with an opportunity to discharge him. Ritchie had previously smoked while working, without fear of punishment from the Company. This time Huck caught him and reported the infraction to Almaroad. I also find from Pedro's testimony that he was aware of Huck's report on March 20. Almaroad was reluctant to impose this harsh penalty on Ritchie. Robbie Mullins, who witnessed the discharge, questioned Almaroad on its severity, in light of Ritchie's clean record. However, Pedro's testimony, and Almaroad's conversation with Delph showed that Almaroad discharged Ritchie because Pedro had insisted upon that action as full enforcement of the Company's policy against smoking on the production line. Here was the final element in the General Counsel's prima facie case, suggesting that Ritchie's insistence on supporting the Union had cost him his job.

The Company argued that Ritchie's smoking was the only reason for his discharge. Pedro testified that the Company's rules, posted on February 25, in the Norton plant's breakroom, required dismissal as the penalty for smoking in the production area. A reading of those rules confirms Pedro's view.

Granted that the Company had rules against smoking prior to February 25, the record showed that management did not strictly enforce them. However, under the pressure of criticism and advice from its franchiser, the Pepsi-Cola Company, the Company tightened up its enforcement. The record showed that after February 25, the Company issued verbal warnings to employees caught smoking in nonproduction areas. Almaroad's reluctance to discharge Ritchie for a first violation of the prohibition against smoking in a production area, was an echo of the laxity with which he had treated smoking on the production line prior to February 25.

Almaroad's reaction to Delph's and Fultz' smoking on the production line, following Ritchie's discharge, provided strong support for the Company's defense. First, in his remarks to Delph, Almaroad divulged that he had to discharge Ritchie for smoking. Then, in an effort to protect Delph and Fultz from the same fate, Almaroad decided not to report their smoking violations to Pedro. Almaroad's action showed that he feared that Pedro would insist on discharging the two employees. There was no showing that at the time Almaroad protected Delph and Fultz, he was aware of their sentiment toward the Union.

Far from showing disparate treatment based upon union considerations, Almaroad's remarks and his action showed that he disagreed with the Company's new policy regarding violation of the no-smoking rules, and that Pedro was sincerely enforcing it. Aside from Delph and Fultz, I find from employee John C. Baker's credible testimony, that after the posting of the new rules concerning smoking, employees Darrell Smith, Curtis Allen, and Eddie Martin smoked in front of Roy Almaroad without being punished. However, there was no showing that Almaroad brought these incidents to Pedro's attention. In light of his disagreement with the new policy regarding smoking, it was unlikely that Almaroad would have afforded Pedro the opportunity to discharge employees for a first violation after March 21. The record shows that after February 25, and until the hearing before me, Pedro's only opportunity to enforce the new antismoking rules came when Huck reported Ritchie's violation on March 20.

In light of Almaroad's treatment of smoking violations after February 25, I have credited Pedro's testimony that he insisted on strict enforcement of the no-smoking rules, which resulted in Ritchie's discharge by a reluctant Almaroad. I also find that Pedro would have insisted upon discharge for smoking in a production area regardless of the violator's union sentiment. Therefore, I find that the General Counsel has failed to show that Ritchie's adherence to the Union was a motivating factor in his discharge. I shall recommend dismissal of the allegation that his discharge violated Section 8(a)(3) and (1) of the Act.

8. Larry Blanken

a. *The facts*

The Company hired Larry Blanken in early January and discharged him on March 3. Prior to March 3, the Company had employed Blanken, off and on, over a period of 4 years. During his last employment by the Company, Blanken worked as a forklift operator, on the loading dock crew under the supervision of Roy Almaroad and Night Supervisor Allen Young.

Larry Blanken supported the Union. He attended a union meeting on February 16, signed a card for the Union, and distributed two or three cards to employees. In late February, he attempted to hand out union literature at a company warehouse in Tazewell, Virginia. On February 21, the Company received a letter from the Union listing Larry Blanken as a member of the organizing committee.

On the evening of February 21, Blanken, while moving a company truck from the loading dock to the front of the plant, felt a ''little jolt'' as he backed into the front end of another parked company truck. Blanken was attempting to

make room at the loading dock for more trucks to be loaded. Pedro came out of the plant office and looked at the front end which Blanken had hit. Pedro did not recognize the driver and asked him his name. Blanken identified himself and then asked Pedro if there was any damage.[45] Pedro said nothing about damage, but cautioned Blanken to be more careful. Blanken saw that he had done no damage and returned to work. Pedro returned to the office.

Larry Blanken went to work on Saturday morning, February 22. When he arrived, Blanken encountered Pedro at the timeclock. Pedro instructed him to come to his office on Monday morning. Pedro said Blanken's visit to his office would be in regard to the the incident on Friday evening.

On the morning of February 24, Larry Blanken arrived in Pedro's office. After reviewing Blanken's truck mishap, Pedro issued a written correction notice which included a written warning to Blanken for backing one truck into another ''with severe impact.'' According to the correction notice, Blanken backed ''too fast & careless.'' Blanken signed the correction notice, showing that he had received a copy of it.[46]

On the morning of February 27, before leaving for work, Larry Blanken telephoned employee Steve Isbell to ask why Isbell and employee Joel Trigg had left work early on the previous day. Isbell asked if he had been fired and if his timecard was in its usual place. Blanken said he didn't know and suggested that Isbell check with Pedro.

Fifteen or twenty minutes after he arrived at work, that same morning, Larry Blanken received instructions from Roy Almaroad to report to Pedro's office. Accompanied by Almaroad, Blanken went to the office, where he found Pedro and one other unidentified person. Pedro asked Blanken if he had called employee Isbell at home. Blanken admitted that he had. Pedro admonished Blanken, telling him that he shouldn't make such calls, that it was company business, and that Isbell had said that Blanken had said Isbell was fired. Blanken denied telling Isbell that he had been fired. Pedro also said he knew that Blanken was on the Union's organizing committee, but that Blanken didn't have any special privileges. Pedro reminded Blanken that he wasn't a boss and had no right to call Isbell and talk to him about his departure from work. Finally, Pedro warned Blanken ''not to let it happen again and take this as a personal warning.'' Pedro conceded that he told Blanken ''that we didn't want him to insinuate himself into the Company's relationship with any other employee and not to do it again.''[47]

At Pedro's direction, Roy Almaroad issued a verbal correction report to Larry Blanken on February 27. The report stated that it was issued because Blanken had told other employees that they had been fired and that the Company had pulled their timecards for the purpose of talking to them about their leaving work without permission.

On March 3, Larry Blanken operated a forklift truck on the evening shift. While loading cases of 16-ounce bottles of soda into a truck, Blanken lifted the supporting pallet and dislodged two cases which fell to the floor. One case of product was completely broken.

Later in the shift, Blanken dropped several cases of canned soda while loading a pallet into a truck. Huck Hunnicutt, who was supervising and helping to stack cases of soda on pallets to be loaded on trucks, witnessed this mishap. Huck directed the cleanup and the loading of three or four cases to replace the loss.

After dropping the two cases of 16-ounce bottles, Blanken placed them on top of a pallet load of 16-ounce returnables. Huck discovered that the damaged cases were leaking down through the pallet load. He asked Blanken to explain this error. Blanken answered: ''I guess I wasn't thinking.'' Blanken moved the damaged cases to the floor.

Finally, Blanken's forklift hit a palletized stack of 2-liter cases and caused two cases to fall to the floor. This incident caused some dents in the cases, but no damage to their contents. Blanken stopped and restored the cases to their stack.

At one point, Huck asked Blanken if he had been drinking. Blanken answered no and reminded Huck that he did not drink. Blanken suggested that the reason for his mishaps was ''no loving this week.'' Huck responded in a joking manner.

By 8:30 or 9 p.m., Blanken and the other employees on the shift had completed their assigned tasks.[48] In a telephone conversation with Roy Almaroad, Huck received authorization to release the employees.[49] As the employees left, Huck said they had done a good job.[50]

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[45] I based my finding that Pedro did not know Larry Blanken at the time of the mishap upon Pedro's testimony. Blanken could not remember whether Pedro had or had not asked him to identify himself. In contrast, Pedro seemed certain about this part of his meeting with Blanken on the evening of February 21.

[46] Pedro testified that Blanken bent the grille and damaged the fenders of the truck he backed into. Pedro also testified that he immediately instructed Blanken to come to his office on Monday morning. Absent from Pedro's testimony is any reference to Saturday, February 22, or to the remarks attributed to him on that date by Larry Blanken.

I also noted that Pedro was anxious to include in his testimony assertions regarding Blanken's facial expressions, suggesting glee, and other assertions designed to create the impression that there was severe impact. However, Pedro's response to the accident did not comport with his description of Blanken's reckless attitude and the severity of the impact. There was no showing that he barred Blanken from operating company trucks or that the damage Blanken inflicted required repair or deprived the Company of the use of the truck. Indeed, according to Pedro's earlier testimony, given on the first day of the hearing, Blanken ''bent the grill some, and there was some damage to the fiberglass fenders.''

In contrast with Pedro, Larry Blanken seemed more concerned about providing his best recollection, without straining to embellish it. Blanken gave his testimony ingenuously. Accordingly, I have credited Blanken's recollection regarding his employment, his union activity, the damage he caused when he backed into a truck on February 21, and his encounters with Pedro following that incident.

[47] The essential facts regarding Larry Blanken's conversations with Isbell and Pedro are not in dispute. I have credited Blanken's testimony that Pedro told him that Isbell told him and Almaroad that Blanken had called and reported to Isbell that he was fired and that his timecard had been removed. Pedro testified that he couldn't remember whether it was Isbell or Trigg who told him of Blanken's call. As Blanken seemed certain as to Pedro's mentioning only Isbell, I have credited his testimony in this regard.

[48] Huck corroborated Blanken's testimony that at the time the evening shift departed, they had completed their assigned task. I find from Huck's testimony that the evening shift had completed loading operations and that, with Almaroad's approval, Huck released Blanken and the other employees without requiring them to clean up.

[49] Night Watchman Samuel Stapleton heard Huck talking on the telephone on the evening of March 3. According to Stapleton's testimony, Huck told someone on the phone ''that they were stacking the pop so it would fall,'' adding: ''Is that a good enough reason?'' The record did not reveal who ''they'' were in Huck's remarks. Nor was there any showing that Huck was referring to Larry Blanken. Thus, I do not agree with the suggestion in the General Counsel's brief that Stapleton's testimony about Huck's remarks on the telephone would, if credited, shed light on the issue of motive in regard to Blanken's discharge.

[50] According to Huck Hunnicutt's testimony, on the evening of March 3, Larry Blanken engaged in willful misconduct and willfully tore up merchan-

Continued

Huck did not write up a correction notice or warn Blanken. He recommended Blanken's discharge to Pedro.

On March 5, Pedro filled out a separation of employment form for Larry Blanken. The form reported that the Company had discharged Blanken for violation of company rules, insubordination, carelessness, and rough handling of equipment. The explanation of the reasons for discharge was as follows:

> Your behavior on the night of 3/3/86. Two supervisors on duty reported that you operated a forklift truck on the loading dock in a reckless manner.

There was no showing that the Company issued a copy of this form to Larry Blanken.

At about 5 a.m. on March 7, Larry Blanken went to work. He found his timecard missing from its usual place. Blanken asked Roy Almaroad about the missing timecard. Almaroad went to find out. He returned and told Blanken that the Company had discharged him because of what had happened on the previous Monday evening. Almaroad advised Blanken that Pedro had sent a registered letter, which Blanken would receive that same day, if he had not already received it.

That same day, Larry Blanken went to his local post office, where he received Pedro's letter, dated March 5. The letter announced that Blanken's employment with the Company had been ''terminated.'' Pedro's letter also gave the following explanation for Blanken's termination:

> The reason for your termination is your behavior on the night of Monday, March 3, 1986. Two of the supervisors on duty report that you operated a forklift truck on the loading dock in so reckless a manner as to spill three different pallets of merchandise and also collided with a stack of full 2-Liter goods while transfering empty Dr. Pepper bottles into the building. You also damaged merchandise by throwing cases of product (which you had damaged by spilling them from the forklift) onto stacks of good merchandise and allowing them to leak down through the good merchandise. You are reported to have responded to a Supervisor's inquiry as to the reason for your outrageous behavior with rebald humor, but no explanation. The supervisor had to send the entire crew home early before clean up in order to avoid further damage to merchandise.
>
> You have been previously warned in writing about reckless operation of the company's equipment. You were at that time counseled as to the danger which your reckless behavious [sic] posed to the company's property and the safety of your fellow employees. You were warned in writing that if you engaged in reckless behavior again you would be terminated. In addition to the instances of recklessness, you also destroyed the company's property . . . [in] what . . . appeared to be a wanton and reckless manner.
>
> Mr. Blanken, we are truly sorry that this measure has become necessary. However, we feel that at this point your persistent course of behavior has left us with no choice.

Pedro's letter advised Blanken to collect his final paycheck at the Company's office on March 7, between 2 and 5 p.m. Employee Terry Henderson was standing in a hallway at the Company's plant on that date. Pedro was standing nearby. I find from Henderson's testimony, that as Larry Blanken passed through a doorway leading from the hall to the dock, Pedro remarked: ''There goes one of the troublemakers.''

b. *Analysis and conclusions*

The General Counsel urged a finding that the written correction notice issued to Larry Blanken on February 24 was in response to the revelation that Blanken actively supported the Union and, therefore, violated Section 8(a)(1) and (3) of the Act. The Company argued that the record did not support such a finding. I find merit in the General Counsel's contention.

Blanken's active support for the Union's organizing campaign among the Company's employees surfaced in a letter which the Company received from the Union on February 21. In that letter, the Union listed Larry Blanken as a member of its plant organizing committee. The record did not disclose when, on February 21, Pedro learned of Blanken's union activity. However, I have found above that Pedro was aware of the Union's letter on February 21, the day it arrived at the Company's office. However, I find from Pedro's testimony that when Larry Blanken backed a truck into the grille and fender of a truck parked in front of the plant, on Friday evening, February 21, Pedro did not know Blanken's identity.

On Friday evening, before he had the opportunity to identify Larry Blanken as one of the union activists listed in the Union's letter, the truck mishap drew only a mild response from Pedro. When he saw the accident, Pedro came out and checked the damage. When Blanken came out of his truck and asked if there was any damage, Pedro merely told him to be more careful in the future. There was no mention of discipline or other supervisory action.

By Saturday morning, Pedro had ample opportunity to learn that Larry Blanken's name was on the Union's letter. Having identified Blanken as a leading union activist, antiunion sentiment was likely to provoke Pedro. Thus, on Saturday, Pedro sought out and directed Larry Blanken to meet with him on the following Monday morning.

On Monday morning, the accident which Pedro had treated so casually on Friday, became a matter of great concern. According to the correction notice which Pedro drew up and presented to Blanken, there was ''severe impact'' and ''damage to vehicles.'' However, as found above, there was a little jolt and no damage. The notice also warned that the ''next occasion of recklessness will result in discharge.''

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dise and vehicles. In further describing Larry Blanken's conduct, Huck testified that he ''rammed the drinks into the truck'' and ''slung a broken case of 16-ounce returnables.'' However, Huck's testimony also reveals that whatever misconduct he perceived on the part of Larry Blanken was not sufficient to cause Huck to order Blanken off the forklift, or to administer a scolding reflecting the seriousness of the asserted misconduct. In short, Huck's testimony suggested that he was trying to bolster the Company's explanation of Larry Blanken's discharge.

In contrast with Huck Hunnicutt, Larry Blanken seemed more interested in recounting the incidents and conversations of March 3 to his best recollection, without concern about their effect on the outcome of the General Counsel's case. I also noted that employee Robert Falin, who witnessed two of Blanken's mishaps, avoided the strong verbiage which Huck adopted. Falin, using milder language, attributed them to poor judgment. Accordingly, where Huck's versions of the events and conversations of March 3 differ from Larry Blanken's, I have credited Blanken.

The timing of the remarkable change in Pedro's attitude toward Larry Blanken's mishap between Friday evening and Monday morning, suggested that the Union's letter was the catalyst. Blanken's truck mishap was a convenient pretext. My findings of Pedro's resort to discrimination against other employees, who assisted the Union, was the final ingredient in the General Counsel's showing that Blanken's union activity was the motivating factor in Pedro's decision to issue a correction notice to him on February 24. I find, therefore, that by issuing to Larry Blanken the correction notice dated February 24 and the threat of discharge it contained, the Company violated Section 8(a)(1) and (3) of the Act.

Turning to the next alleged discriminatory adverse action against Larry Blanken, I find that it violated the Act. The verbal correction report of February 27 was a disciplinary action carrying an implied warning of further disciplinary action if Blanken again talked to fellow employees about their employment status with the Company. However, Pedro's inclusion of a reference to union activity in his remarks to Blanken prior to the issuance of the verbal correction report, evidenced an intent to impede Blanken's organizing effort by prohibiting him from talking to employees about the Company's employment policies. In light of Pedro's demonstrated hostility toward the Union, I find that he used the correction notice in an effort to discourage Blanken from continued union activity, and thereby violated Section 8(a)(1) and (3) of the Act.

It is well settled that Section 7 of the Act extends protection to employees' discussions regarding wages, hours, and conditions of employment. ''*The Loft*'', 277 NLRB 1444, 1461 (1986). Here, Pedro prohibited Larry Blanken from talking to fellow employees about their employment with the Company. Indeed, Pedro admitted that he forbade Blanken from discussing any aspect of the relationship between the Company and any other employee. This prohibition extended beyond the plant and working hours. That such a discussion might involve only Blanken and one other employee would not remove it from the protection of Section 7 of the Act. For, as the Board recognized in *Root Carlin, Inc*., 92 NLRB 1313, 1314 (1951):

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

I find that the prohibition, which Pedro voiced on February 27, was likely to interfere with, restrain, and coerce Larry Blanken and other employees in the exercise of their Section 7 rights to discuss their wages, hours, and working conditions and the possible advantage union representation might give them in that regard. Accordingly, I further find that by Pedro's prohibition, the Company violated Section 8(a)(1) of the Act. *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The General Counsel contended that the Company seized upon Larry Blanken's forklift accidents on the evening of March 3, as a pretext for ridding itself of a union advocate. The Company urges rejection of that contention. Instead, the Company asserts that Blanken's misconduct in the operation of his forklift was the only reason for its decision to discharge him. I agree with the General Counsel.

I have found that Pedro punished Larry Blanken on February 24, and, again, on February 27 in violation of the Act. In the first instance, Pedro's excuse was pretextual. In the second, Pedro used his disciplinary power to discourage Blanken from talking to fellow employees about the Union and their wages, hours and conditions of employment. Thus, Pedro, on two occasions, in quick order, had shown his animus toward Larry Blanken's support for the Union.

There was no showing that Larry Blanken abandoned the Union after February 27. I find it likely that before March 3, Huck Hunnicutt was aware of the union letter announcing Larry Blanken's active support for the Union. Nor was there any reason to assume that Pedro had changed his attitude toward Blanken's adherence to the Union.

Also, as found above, as early as February 22, Huck was active in the Company's antiunion campaign. On that date, he violated the Act when he coercively interrogated employee Stallard about signing a union card. On the same day, Huck again violated the Act by encouraging Stallard to revoke his union card.

The record also shows Pedro's active and persistent hostility toward the Union, and employees who supported it. As I have found above, Pedro used the Company's disciplinary system of warnings, suspensions, and discharge to combat the Union's support among his employees.

On March 5, only 6 days after inflicting the second unlawful discipline on Larry Blanken, Pedro, on Huck's recommendation, decided to discharge the same employee. The Company had willingly hired and rehired Blanken over a 4-year period, with no showing of any intervening discipline at its hands. Yet during the 12 days following the Company's realization that he was a union supporter, the Company punished him three times. From these circumstances, Pedro's reference to him on March 7, as a ''troublemaker,'' and the Company's manifestations of union animus, I find that the General Counsel has made a prima facie showing that union activity was a motivating factor in Pedro's decision to discharge Larry Blanken.

The Company asserted that Pedro relied upon Huck's report, when he decided to discharge Larry Blanken. According to Pedro, Huck advised him that Blanken had engaged in what Pedro ''considered pretty outrageous conduct, reckless and abusive of our equipment and property and he'd already been warned once.'' Pedro also testifed that he ''felt that it was pretty clear that it was willful recklessness.'' However, I find from the infirmities both in Huck's testimony and in Pedro's explanations of his decision, that the Company used Blanken's forklift mishaps on the evening of March 3, as a pretext.

Huck Hunnicutt's conduct on March 3 suggested that he did not consider Larry Blanken's forklift mishaps serious enough to warrant discipline. For, as found above, when Huck saw Blanken's mishaps on the night of March 3, he did not scold him or remove him from the forklift. Instead, he asked Blanken if he had been drinking and responded in a joking manner, when Blanken blamed his faulty forklift operation on ''no loving this week.'' However, I have no doubt that on March 4, Huck reported Blanken's forklift mishaps, and recommended them as an excuse for Blanken's discharge.

However, in his haste to get rid of Blanken, Pedro provided evidence that the forklift mishaps camouflaged the real reason for his decision. The separation of employment form which Pedro drafted on March 5 reported that the Company was discharging Blanken for violating company rules, insubordination, carelessness, and rough handling of equipment. However, the Company did not present that form to Blanken. Instead, on the same day, Pedro drafted and mailed a discharge letter to Blanken. Pedro's letter did not mention insubordination or violation of company rules. Instead, it referred to the warning issued to Blanken on Fehruary 24. The substitution of the letter for the separation of employment form and the shift in reasons suggested that Pedro was not convinced that the missing reasons could be substantiated. By shifting his reasoning, Pedro also attempted to reinforce the excuse he had received from Huck to make certain that he had camouflaged the real motive for Blanken's discharge.

Pedro's reliance upon the warning included in his correction notice of February 24, as a reason for discharging Larry Blanken, also evidenced his unlawful design. For, I have found that Pedro violated Section 8(a)(3) and (1) of the Act, when he issued that correction notice and warning. There, Pedro relied upon the pretext that Blanken had operated a company truck in a reckless manner. The real reason, I found, was Larry Blanken's participation in the Union's organizing campaign. On March 5, Pedro found that warning a convenient alternative to ''insubordination'' and ''violation of company rules,'' the two reasons indicated on the separation of employment he withheld from Blanken. I find from Pedro's attempts to contrive an exculpatory explanation, that the Company's proffered defense was pretextual.

Assuming that Pedro's letter truthfully stated the business reasons for his decision to discharge Larry Blanken, the Company did not meet its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Wright Line* required that the Company show, affirmatively, that Pedro would have terminated Blanken even absent the employee's union activity. The Company showed instances in which it discharged employees for a variety of reasons involving unsafe or abusive operation of over-the-road trucks, and, in one instance, for drinking on the job and recklessly operating a forklift. However, the Company did not show that it had discharged or otherwise disciplined any other employee for spilling pallets of product, colliding with one or more stacks of bottled product, and stacking broken and leaking cases of soda on top of undamaged cases. Indeed, the Company made no showing that it had disciplined any employee for negligence in the operation of a forklift.

I find no merit in the Company's proffered explanation of Pedro's decision to discharge Larry Blanken. Instead, I find that the General Counsel has shown that Pedro discharged Blanken on March 5, because he supported the Union's organizing campaign among the Company's employees. I further find that by inflicting this reprisal upon Blanken, the Company violated Section 8(a)(3) and (1) of the Act.

9. Bobby Blanken

a. *The facts*

The Company hired Bobby Blanken early in 1984, and employed him as a mechanic. At the time of the hearing, Elmo Wiles was his supervisor. Bobby Blanken began assisting the Union's organizing campaign in February. He solicited the signatures of fellow employees on union authorization cards. In its letter dated February 1, which the Company received on February 21, the Union included Bobby Blanken as a member of its organizing committee.

On March 6, the Company sent Bobby Blanken and employee Richard Shular to the Company's Bristol, Virginia warehouse, to install a clutch in a route truck. Early in the afternoon, Warehouse Manager Harold Powers asked Blanken and Shular if they wanted lunch. Blanken and Shular replied that they would have lunch later, on their way to Johnson City, Tennessee. At about 2 p.m., Blanken and Shular finished their assignment at the Bristol warehouse.[51]

As he and Shular were about to depart, Blanken asked Powers if his employees were working, and, if they were not, whether he, Blanken, could talk to them. Powers answered that his employees were getting ready to go home and that he would send them out. As the Bristol employees came out, Bobby Blanken handed each a union authorization card. Blanken told the employees ''they could read it, sign it, mail it back in or throw it in the garbage, the choice was theirs.''[52] After the few minutes required to hand out the cards, Blanken and Shular left for Johnson City.

On the morning of March 12, Bobby Blanken came to work and found a note on his timecard instructing him to report to Pedro's office before punching in. Blanken complied, but Pedro was not in his office. After a few minutes, Pedro returned. He called Blanken into his office, where Seven-Up/Dr. Pepper Brand Manager Dale Kennedy and George Hunnicutt Sr. were present. Pedro began by telling Blanken, ''This has nothing to do with the union cards that you passed out in Bristol.'' Blanken asked what the purpose of his visit to Pedro's office was. Pedro said he had something he wanted Bobby Blanken to sign for insubordination, keeping employee Shular from working and stealing company time. Blanken refused to sign a correction notice dated March 7.[53]

[51] There was no issue of fact regarding Blanken's and Shular's work assignment at Bristol, and the exchange between Powers, Blanken, and Shular about lunch. However, there were conflicts between Blanken's, Shular's, and Bristol employee Clyde Snyder regarding when Blanken and Shular finished their work and departed from the Bristol warehouse. Snyder provided a detailed recollection of the chronology of his own, Blanken's, and Shular's activity on March 6. Blanken and Shuler disagreed as to when they finished and when they left the Bristol warehouse. However, they did not deliver their testimony with the certainty which Snyder conveyed. Accordingly, in resolving the issues of fact regarding when Blanken completed their assignment and left the Bristol warehouse, I have relied on Snyder's testimony.

[52] According to Powers, Bobby Blanken asked him to hand out union literature to the employees, and, when Powers refused, Blanken distributed it to employees Gregory Smith and Clyde Snyder. Dale Kennedy testified that Powers told him that Blanken had offered Powers some union cards, which Powers rejected, and that Blanken then said he would distribute some cards. Snyder testified that, Blanken distributed authorization cards and invited employees to fill them out and mail them to the Union. According to Shular, Blanken solicited Powers' signature on a union card. In resolving the conflicts between Blanken's testimony and that of other witnesses, who testified about his conversation with Powers, and about Blanken's union activity at the Bristol warehouse, I credited Blanken and Snyder, both of whom testified in a frank manner. I also noted that the correction notice which the Company presented to Blanken corroborated his testimony. It asserted that Bobby Blanken solicited the Bristol employees, but did not mention distribution of union literature or soliciting Powers' assistance or signature.

[53] I based my findings regarding the confrontation between Pedro and Bobby Blanken, upon Blanken's and company witness Dale Kennedy's testimony. Pedro seemed more interested in making a self-serving declaration and describing Blanken's bad manners than in searching his memory for details

The correction notice, which Pedro offered for Bobby Blanken's signature, gave improper conduct as the reason for its issuance. The following explanation of the reason for the corrective action auPeared on the notice:

> On 3-6-86 you and Richard Shular were dispatched to the Bristol warehouse to replace a clutch after which you were to go to Johnson City to pick-up parts. After having finished the clutch job and while still on the Company's time, you held up Mr. Shular and the Company paid you and Mr. Shular while you solicited the employees at the Bristol warehouse to sign union cards. While you have a right to engage in union activities, you do not have a right to solicit for *any* purpose while on company time, or to interfere with another employee's work while you do so. This rule would apply no matter what the purpose of your solicitation was. You were not on any break and neither was Mr. Shular. Further, there were people waiting on you at Norton to return with the parts.

The notice also recited the corrective action against Blanken. He received a written warning and advice that ''further serious misconduct will result in severe discipline.''

There was no showing that as of March 6 the Company had promulgated and maintained a no-solicitation rule. Bobby Blanken was not aware of such a rule. On the contrary, I find from Route Supervisor Jerry M. Ryans' testimony that the Company did not maintain a rule prohibiting solicitation during working time. I also find from Ryans' testimony that the Company permitted employees to solicit for various nonwork-related purposes during worktime.

b. *Analysis and conclusions*

The General Counsel argued that by issuing the written warning to Bobby Blanken on March 12, the Company sought to squelch his union activity, and thereby violated Section 8(a)(3) and (1) of the Act. The Company urges dismissal of the allegations regarding Blanken's written warning on the ground that union activity had nothing to do with its issuance. Instead, the Company insisted that it issued the warning only because Blanken wasted his and Shular's working time. I find merit in the General Counsel's position.

One day after Bobby Blanken had offered union cards to its employees at the Bristol warehouse, the Company prepared a correction notice warning him that repetition of that conduct would ''result in severe discipline.'' The correction notice points to Blanken's union activity as the catalyst for the Company's annoyance. Pedro's advice to Blanken on March 12, that he refrain from union activity during worktime, also shows a preoccupation with Blanken's solicitation on the Union's behalf. The Company's demonstrated tendency to punish union activists provided further strong support for the General Counsel's contention.

The Company contends that it punished Bobby Blanken lawfully, on the ground that on March 6 he misused his and Shular's worktime, and that one other employee, Johnny Harris, suffered the same fate for similar misconduct. In short, the Company argued that it did not inflict disparate punishment on Blanken. However, the Company's defense falls short of the mark.

The record shows that the Company did not maintain any rule against solicitation. The Company did not show that it ever punished any employee, other than Bobby Blanken, for soliciting during working hours. Indeed, the Company permitted its employees to solicit for nonwork-related purposes, during their worktime. However, the Company punished Bobby Blanken for soliciting fellow employees to sign union cards, during his and Shular's worktime. Here, indeed, was the disparate treatment which the Act prohibits.

Nor has the Company shown that the misconduct, for which it issued a written warning to employee Harris on May 20, 1983, bore any resemblance to Bobby Blanken's union activity on March 6. Harris' warning recited the following six counts of misconduct:

> (1) Failure to execute your assigned duty, to stay in your assigned area.
>
> (2) Failure to observe safety standards.
>
> (3) Failure to properly install parts on jobs assigned to you.
>
> (4) For being outside your assigned work area and distracting other people from doing their jobs.
>
> (5) Failure to show up for work at your appointed starting time.
>
> (6) Failure to respond to numerous verbal reprimands and warnings concerning the above items.

I find, contrary to Pedro's declaration, on March 12, that he issued the correction notice, with its written warning for misconduct, to punish Bobby Blanken for having solicited employee signatures on union cards. The Company's willingness to permit solicitation for other nonwork-related purposes showed that its expressed concerns about misuse of company time and timely arrival of ''parts'' were pretextual. Indeed, there was no showing that the solicitation took more than a few minutes, or that it interfered with the Company's business. The Company's only motive for punishing Blanken was to discourage him from actively supporting the Union. I find that by issuing the correction notice dated March 7, the Company violated Section 8(a)(1) and (3) of the Act. *Animal Humane Society*, 287 NLRB 50, 57 (1987).

The General Counsel alleged that the Company violated Section 8(a)(1) of the Act on March 12, by interrogating

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of what he said about Bobby Blanken's right to solicit on company time, and the correction notice he tendered to Blanken.

Blanken's recollection was limited to Pedro's offer of the correction notice for Blanken's signature. Dale Kennedy corroborated Bobby Blanken's testimony and also testified that Pedro instructed Blanken not to solicit on company time.

Bobby Blanken testified on redirect examination that at some point in his remarks, Pedro asked him if he had solicited employees on the Union's behalf, at the Bristol warehouse. Counsel did not specifically examine Pedro on the assertion that he had interrogated Blanken on March 12. Pedro's testimony is silent on that matter. Dale Kennedy's testimony is also silent as to whether or not Pedro asked Blanken if he had solicited the Bristol warehouse employees to sign union cards.

However, I do not credit Blanken's testimony that Pedro interrogated him. I find from Blanken's testimony that at the outset, Pedro's remarks, on March 12, showed that he knew that Blanken had solicited the Bristol employees for the Union. Therefore, I find it unlikely that Pedro would have wasted his time investigating the matter anew. More important, Blanken failed to testify about the alleged interrogation on direct examination, when he was providing his account of his meeting on March 12, with Pedro. Instead, his testimony ahout the asserted interrogation came on redirect examination, after prodding by counsel. Further, on redirect examination, Blanken did not disclose where in the conversation Pedro posed the question. In sum, I find that the infirmities in Blanken's testimony about his alleged interrogation fatally impaired its reliability.

Bobby Blanken about his solicitation for the Union. In support of this allegation, the General Counsel offered only Blanken's testimony. However, I did not credit the portion of Blanken's testimony regarding this allegation. Accordingly, I find that the General Counsel has failed to show that this alleged interrogation occurred and shall recommend dismissal of this allegation.

However, although not alleged in the consolidated complaint, I find from the fully litigated facts, that the correction notice dated March 7, and Pedro's remarks on March 12, included an overly broad proscription of solicitation by Blanken on company time. I also find that the Company promulgated the restriction on solicitation in response to the Union's organizing campaign. I further find, therefore, that by promulgating an overly broad proscription of solicitation directed at union activity, the Company violated Section 8(a)(1) of the Act. *Southwest Gas Corp.*, 283 NLRB 543, 546 (1987).

10. Robert Falin

a. *The facts*[54]

The Company employed Robert Falin as a laborer from April 1985 until he left for another job in late 1986. Roy Almaroad was his supervisor.

Falin supported the Union. In January or February, Falin signed a card for the Union. He attended three or four union meetings. On three occasions, Falin joined others to handbill for the Union, outside the Company's Norton plant. Once, his wife participated in the handbilling. Falin joined the Union's organizing committee in February. The Union's letter of February 18, to the Company, showed Falin as a member of the organizing committee. On or about February 2, Supervisor Robbie Mullins asked Falin if he had signed a union card.

Among his duties, Falin operated the Company's uncaser. The uncaser is a component of the Company's returnable line, from which come glass bottles filled with one of the Company's beverages. The bottling process begins with the loading of cases of returnable bottles in cartons onto a conveyor belt. The conveyor belt moves the cases of bottles to the uncaser, on the way to a washing machine. The uncaser separates the bottles from their cartons and cases, placing the bottles on an upper conveyor, and the empty cartons in the cases on a lower conveyor. The upper conveyor carries the bottles to a large table, where they collect before entering the washer.

On April 3, while operating the Company's uncaser, Falin saw that it was jammed and was letting bottles fall over. Bottles began falling to the floor and breaking. Falin switched off the uncaser and stopped the line. He then picked up the bottles, put them on the conveyor, and turned the uncaser on.

Operations Manager Roy Almaroad saw that the bottle washer had stopped. Upon learning that Falin had shut the uncaser off, Almaroad went to him, seeking an explanation. Falin explained that he had been picking up bottles which had fallen off the line.[55] After rejecting Falin's explanation, Almaroad issued a verbal correction report to him for unsatisfactory work performance. The verbal correction report warned Falin not to turn the uncaser off and stated that he would probably receive a 3-day suspension if he turned it off again.[56]

On May 19, Falin saw that the uncaser was malfunctioning. Instead of pulling all of the bottles out of each carton, the uncaser was leaving 10 to 16 bottles in a case. Falin attempted to empty the cartons and place the remaining bottles on the production line. Finding difficulty in keeping up with the flow of cases of bottles, Falin shut the uncaser off.

Almaroad saw Falin shut the uncaser off and immediately went to find out why he had done so. Falin explained that the machine was not picking the bottles up properly. As a result of Falin's action, the bottle washer had stopped. Almaroad turned the caser on and found that it ''worked fine.''[57]

That same day, Almaroad issued a correction notice to Falin for improper conduct and unsatisfactory work performance. The explanation of the reasons for the corrective action referred to the shutdown of the uncaser and the previous warning for similar conduct. The explanation also remarked that Falin should have told a supervisor about his difficulty with the uncaser. The correction notice included a written warning for misconduct, a final warning, and a 3-day suspension beginning on May 20.[58]

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[54] I based my findings of fact upon the testimony of Robert Falin and Roy Almaroad. The essential facts regarding the alleged discrimination against Falin are not in dispute.

[55] Almaroad testified that when he sought an explanation for the uncaser's shutdown, Falin explained that there had been a backup of cases. However, I have credited Falin's uncontradicted testimony that he shut the uncaser off because it had jammed, resulting in bottles falling off the conveyor onto the floor. I have also credited his testimony that he picked up the fallen bottles and placed them upright, on the conveyor belt. Supervisor Mullins testified that when he came over to find out about the uncaser stoppage, Falin said he had been picking up bottles. Mullins also testified that Almaroad was present at that time. Absent from Mullins' version of Falin's remarks, was any reference to a backup of cases. Thus, I found that Mullins' version of Falin's explanation for his shutdown of the uncaser was more logical than Almaroad's version. Accordingly, I have credited Mullins' testimony regarding Falin's explanation of the April 3 uncaser shutdown.

I based the remainder of my findings of fact regarding Falin's employment, his union activity, and the incidents on April 3 and May 19 upon his and Almaroad's testimony.

[56] In its brief, the Company asserted that Almaroad issued the verbal warning because he had previously cautioned Falin against stopping the uncaser that same day. The Company based that assertion upon Robbie Mullins' testimony. However, Almaroad's testimony shows that on April 3 he scolded Falin only once about shutting off the uncaser. Falin's testimony agrees with Almaroad's account. Falin and Almaroad were directly involved in the April uncaser shutdown. They were more likely to remember what happened and what was said, than was Mullins, who was a spectator. I also noted that they testified with more self-confidence than Mullins showed. Therefore, on this issue of fact, I have credited their testimony where it conflicted with Mullins'.

[57] According to witnesses Shirley Stidham and Hester Fields, on May 19, Falin shut the uncaser down more than once, and Almaroad, at least twice, ordered to cease shutting it down. Falin testified that he shut the uncaser down once on that date. Almaroad testified about only one shutdown and only one confrontation with Falin on May 19. Finally, the correction notice which Almaroad issued on that date suggests that there was only one shutdown. I also noted that Stidham and Fields seemed uncertain as they testified about what happened on May 19. Accordingly, I have rejected their versions of the circumstances leading up to Falin's 3-day suspension on May 19.

[58] Robbie Mullins testified that on April 3 and on May 19 he came to the uncaser after Falin had shut it off, and found no reason for such action. However, I have credited Falin's assertions that the uncaser was jammed on April 3, and that on May 19 it did not pick up bottles properly. Thus, assuming that I credited Mullins' testimony, I would find that Falin had remedied the cause of the shutdown before Mullins arrived at the uncaser.

b. *Analysis and conclusions*

The General Counsel contended that the Company issued the warnings of April 3 and May 19 to Robert Falin because of his involvement with the Union's organizing campaign. The Company argues that the General Counsel has not shown that Falin's union activity was a motivating factor in the issuance of either the verbal correction report on April 3, or the correction notice on May 19. I find merit in the General Counsel's contention.

Falin became a union activist early in the Union's campaign. He signed a union card in January or February, and attended three or four union meetings. He also handbilled outside the Norton bottling plant on three occasions. Falin joined the Union's organizing committee in February.

On February 20, the Company received the Union's letter showing that Falin was a member of the organizing committee. At about the same time, Robbie Mullins singled Falin out and asked him if he had signed a union card. I find that by the end of February, Almaroad was aware of Falin's union activity.

From the outset of the Union's campaign at the Norton plant, Almaroad showed hostility toward employees who supported the Union. I have found that, in attempting to squelch union activity, Almaroad unlawfully interrogated employees about their union activity, threatened reprisals, including loss of employment if employees supported the Union, and solicited employees to revoke their union cards.

In sum, the evidence showed that Almaroad was aware of Falin's union activity, and that Almaroad had repeatedly violated the Act to discourage employees from supporting the Union. I also noted that Almaroad imposed the verbal warning on April 3, less than 2 months after the letter announcing Falin's alignment with the Union had arrived at the Company. Further, the record showed that the Company's reprisals against other union supporters continued in the spring and summer. From these circumstances, I find that the General Counsel has made a prima facie showing that union activity was a motivating factor in Almaroad's decisions to punish Falin on April 3 and May 19.

In essence, the verbal correction report of April 3 and the correction notice of May 19, respectively, assert that the Company disciplined Falin because he turned off the uncaser. In contrast with Almaroad's testimony, the verbal correction report did not weigh the sufficiency of Falin's stated reason for shutting the uncaser off. Instead, the verbal correction report warned that if Falin turned the uncaser off again, he would probably suffer a 3-day suspension. The correction notice stated that Falin stopped the uncaser on May 19 because ''he couldn't pick up bottles which had fallen over on the deadplate transfer fast enough.'' The notice declared that Falin had ''[n]o authority to do this.'' The final assertion regarding the asserted improper conduct on May 19 was that Falin had been ''[p]reviously warned for the same misconduct.''

In its brief, the Company claimed that one of the reasons justifying issuance of the verbal correction report on April 3 was that Falin kept the uncaser turned off longer than necessary to restore the fallen bottles to the line. However, I find that the verbal correction report did not reflect that claim. Nor did Almaroad mention excessive time, when he scolded Falin on April 3. Thus, this aspect of the Company's explanation suffers from the infirmity of being an afterthought. In any event, the record failed to disclose the length of time during which the uncaser was shut off on April 3.

I find from Robbie Mullins' testimony that the Company expects employees to shut the uncaser off for a variety of reasons. Falling bottles, jammed cases, or a broken belt on the line are some of the reasons, according to Mullins' credited testimony. I also find from Mullins' testimony that the Company does not require that employees obtain supervisory authority to shut the uncaser down if the enumerated reasons or comparable mishaps occur.

In light of the Company's policy, I find that when Falin shut down the uncaser on April 3, he acted properly. The machine had jammed and bottles were falling onto the floor. Falin stopped the uncaser to clear the blockage and restore the fallen unbroken bottles to the conveyor line. Nevertheless, Almaroad disciplined him for stopping the uncaser. Almaroad also warned Falin that he would suffer a 3-day suspension if he stopped the uncaser again. This incident raised the suspicion that Almaroad was looking for an excuse to punish Falin. In any event Almaroad's warning set the stage for the next malfunction.

Almaroad's next opportunity to punish Falin came on May 19, when the uncaser began leaving bottles in the cases. Falin attempted to remedy this breakdown manually. The uncaser was faster than he was. Again, consistent with the Company's policy, Falin shut the uncaser down. He caught up by removing from the cases the bottles which the machine had left. Almaroad observed Falin's action and issued a correction notice to him. As threatened, Almaroad imposed a 3-day suspension on Falin.

In an effort to improve upon his scheme, Almaroad embellished his written explanation in the correction notice. He complained that Falin had acted without authority, and suggested that Falin should have consulted a supervisor. There was no showing that the Company had such a requirement when the uncaser acted as it did on May 19. Indeed, Robbie Mullins' testimony showed the contrary.

The Company's attempt to show that Falin did not suffer disparate treatment on April 3 and May 19 was unsuccessful. I find from Falin's and Robbie Mullins' testimony that the Company's employees customarily shut off the uncaser, when they deemed such action necessary, without checking with a supervisor, and without fear of punishment. There was no showing that the Company issued any verbal correction report, or any correction notice, or imposed any other discipline on anyone for shutting off the uncaser, other than Falin.

I find from Jamie Fultz' uncontradicted testimony that, during his employment at the Norton plant, he shut the uncaser down as many as three times per day for various reasons, involving the flow of bottles. Almaroad reacted to such stoppages by hollering at Fultz to get the machine going. Neither Almaroad nor any other member of management imposed any discipline on Fultz for stopping the uncaser.

Instead, the Company presented a correction notice which Almaroad issued to employee Fultz on May 14, for starving the uncaser by failing to load sufficient bottles on the nonreturnable line. According to the Company and Almaroad, starving the uncaser by shutting it off is the equivalent of failing to load enough bottles on to the line. I disagree.

There was no showing that Fultz starved the uncaser because of some mishap in that machine, or elsewhere on the

conveyor belt. In contrast, on April 3, and again on May 19, Falin shut the uncaser off to remedy a minor breakdown in the system. I find, therefore, that the Company has not shown that Falin's punishment was a normal response to similar conduct by other employees.

I find that the Company has failed to rebut the General Counsel's strong showing that union activity was a factor in Almaroad's decisions to issue the verbal correction report of April 3, which contained a warning, and the correction notice of May 19, with its 3-day suspension. I find, instead, that Almaroad's asserted reasons for those adverse actions were pretextual, and that he issued them because Falin supported the Union. Accordingly, I further find that by Almaroad's discrimination against Falin on April 3 and May 19, the Company violated Section 8(a)(3) and (1) of the Act.

11. Francisco Vega

a. *The facts*

The Company employed Francisco Vega at its Norton plant from August 2, 1982, until August 14. He actively supported the Union's organizing drive. Vega signed a union card. The Union's letter of February 18, to the Company, announced that Vega was a member of the organizing committee. George Hunnicutt Sr.'s letter of February 22, to the Company's employees, announced that Vega was helping the Union.[59]

Vega handbilled once, in March or April, outside the Norton plant, as Pedro and Roy Almaroad watched. Vega also handbilled for the Union, once, at the Company's Tazewell, Virginia facility. He distributed union cards to employees for their signatures and attended union meetings.

On March 27, Pedro saw Vega carrying a cup of hot chocolate in a storage room, which is part of the syrup room. Pedro reproached Vega for violating a company prohibition against eating or drinking in the syrup room. Pedro conducted Vega to the Company's breakroom and showed him a notice to employees, dated February 2, 1981, which the Company had reposted in February. The notice announced that:

> [E]ffective, immediately it is absolutely forbidden for employees to consume their lunch or any other food anywhere in the plant except the lunchroom. This applies to the loading crew as well as production employees.
>
> Violators may be dismissed.

Pedro and Vega returned to the syrup room. Pedro went to find Roy Almaroad, and returned with him to the syrup room. Almaroad saw that Vega was drinking his hot chocolate, and asked if he knew that he should not be doing so. Almaroad sent Vega to clock out in the breakroom and wait there for a decision on the length of his suspension. Pedro saw Vega in the breakroom and sent him home to wait for the decision.

Within 2 days, Almaroad telephoned Vega and told him that his suspension would be for 5 days. When he returned to work on April 4, Almaroad issued a correction notice to Vega for breaking a company rule by eating in the syrup room. The notice mentioned Vega's 5-day suspension without pay.[60]

In April, following Vega's suspension, Pedro posted in the breakroom a copy of a letter from the Board to the Union's counsel, stating that the Union had not filed its brief on time in the pending representation proceeding. Soon after Vega saw the letter, he questioned Pedro about it at work. Pedro responded with an explanation which ended with: ''Well, it means they are really taking care of you, Chico.''[61]

On May 26, the Company promulgated a requirement that all production employees wear safety glasses ''at all times while in the plant while production is in progress.'' The Company issued safety glasses to the production employees. The regulation stated that the penalty for a first violation of its provisions would be ''sent home for the day.'' A second violation would incur a 3-day suspension, and a third violation would bring on discharge.

On June 24, Vega was working at the back of the bottle washer with his safety glasses on top of his head. Huck Hunnicutt approached Vega and told him that he should not be wearing his glasses on his forehead. Vega said he knew that, but it was hot and his glasses had fogged up. Vega moved his glasses down over his eyes and continued working.

A short time later, the washer stopped. Vega felt hot and pushed his glasses to the top of his forehead. Huck returned and told Vega to put the glasses over his eyes. Vega explained that the washer had stopped and that he moved the glasses to his forehead because he felt hot. Huck insisted that Vega wear his safety glasses over his eyes. Vega replied testily that they were his eyes, and if anything happened to them, he, Vega, would pay for them. Huck argued that if

[59] There were no issues of credibility regarding the dates of Vega's hiring and discharge, his union activity, or the Company's knowledge of his support for the Union.

[60] Where there were conflicts in testimony between Vega and Almaroad, regarding the incident on March 27, I have credited Vega. In resolving the issue of credibility, here, I took note of Almaroad's testimony regarding his assessment of the punishment which he imposed on Vega for having hot chocolate in the syrup room on that date.

Almaroad testified that under company policy he could have discharged Vega, but that he and Pedro decided to be lenient and limit the punishment to a 5-day suspension. On cross-examination, Almaroad testified that there was a sign on the door to the syrup room, warning of automatic dismissal as punishment for eating or drinking in that room. However, the Company did not provide a copy of the sign. No other witness mentioned such a sign. Nor did the Company's brief refer to such a sign. Review of the Company's rules regarding cleanliness revealed no such rule. Finally, I noted that on March 27, when Pedro wanted to show the prohibition against eating and drinking, he took Vega to the breakroom and not to the door of the syrup room.

Almaroad's gratuitous claim of leniency for himself and Pedro evidenced an intent to assist the Company's defense. His unsubstantiated testimony regarding a disciplinary policy limited to the syrup room points to the same intent. It seemed likely that if the Company had such a policy, it would have offered a copy of the notice into evidence to support the claim of leniency.

The Company's failure to do so cast serious doubt on Almaroad's testimony regarding his role in Vega's punishment and in the events leading up to Vega's departure from the plant on March 27.

Vega appeared to be providing his best recollection of what happened to him on March 27, and what Pedro said when he sent Vega home that same day. Accordingly, I have credited Vega where there was a contradiction or inconsistency between his testimony and Almaroad's regarding the circumstances leading up to Vega's departure from the Norton plant on March 27.

[61] I have based my findings regarding Pedro's remark on his testimony. Here, Pedro seemed to be providing his best recollection in a forthright manner. Vega seemed uncertain about the context in which Pedro made his sarcastic comment about the Union. On cross-examination, counsel refreshed Pedro's memory somewhat. However, Pedro's version was more detailed and logical in its content.

Vega's eyes suffered injury, ''we all have to pay.'' Huck walked away.

Huck complained to Pedro and Roy Almaroad about Vega's refusal to wear safety glasses, and about his obstinacy. Pedro found Almaroad, and the two went to Vega, who was working at the washer. Vega was properly wearing his safety glasses. However, he admitted to Pedro that he had not been wearing safety glasses over his eyes, when Huck approached him. It was around 9:30 or 10 a.m. when Almaroad, in Pedro's presence, sent Vega home for the rest of the day.

When Vega returned to work, on June 25, Almaroad gave a correction notice to him for violating the Company's regulations requiring employees to wear eye protection. The correction notice explained that Vega had received two warnings to keep his glasses on, and that on the second occasion, he ''was smart with Huck.''[62]

At 4:45 p.m. on July 2, Vega shut his line down, at Almaroad's direction. Vega began pushing some boxes to accommodate the remaining bottles on the production line. Pedro saw that Vega was wearing his earplugs pushed sideways, into the cavities in front of his ear canals, rather than perpendicularly into the ear canals.

On May 22, the Company announced a policy requiring production employees to wear earplugs while production was in progress. The progressive discipline for failing to comply, followed the same steps which the Company provided for its safety glass policy. During the same month, the Company held a meeting with all of its employees, at which it distributed one pair of earplugs to each employee. The plastic container accompanying each pair of earplugs had instructions for their use printed on its outside. The second step in these instructions was to insert the plug ''well into the ear canal.''

On July 2, Pedro told Vega that he was wearing his earplugs incorrectly. Vega agreed, but added that the noise wasn't bothering him, as he had shut his line off. Pedro, decided that Vega had violated the Company's earplug regulations. Under the Company's stated policy, this first offense was punishable by dismissal for the day. Pedro remarked that as it was the end of the workday he would not send Vega home.

On July 3, Almaroad issued a correction notice to Vega for violating the Company's earplug regulations. The correction notice explained that Pedro had seen Vega ''wearing ear protection improperly. Had plugs wedged into outer ear only sideways.'' The notice also said: ''First warning is issued.'' It warned that the next ear or eye offense would ''result in 3-day suspension.''[63]

On Thursday, August 14, Vega worked on a baling machine, compressing cardboard. Employee Bobby Worley was moving pallets of cardboard from the back loading dock to Vega, using a forklift. Vega put the cardboard into the baler, and pushed a button which started the compressing action. When the baler had compressed the cardboard, Vega removed it from the machine and banded it. The baler took 1 or 2 minutes to compress a load of cardboard. Vega took 10 or 12 minutes to band it.

Almaroad instructed Vega to separate paper from the cardboard and set it aside. In the course of doing so, Vega picked up a Sports Illustrated, glanced at it, and placed it on top of a conveyor line motor. Vega continued filling the baler, pressing the button, and waiting for the machine to compress the cardboard. While waiting, he glanced at the magazine. When the compressor finished its task, Vega looked up from the magazine and banded the cardboard.

Worley noticed that the flow of cardboard from the back loading dock was backing up at the baler. Two employees were taking the cardboard from a trailer and loading it on pallets. Worley was bringing it too quickly for Vega, who was working at his usual rate. Vega was not reading when Worley came to the trailer with the cardboard.

Worley looked for Almaroad alleviate the backup at the baler. His search brought him to the office, where he met Pedro. Worley informed Pedro of the situation at Vega's baler. Pedro and Worley went to the baler. They saw the baler compacting cardboard, while Vega was looking over his left shoulder at a magazine, which was laying open on top of a motor. Worley saw that Vega had the next load of cardboard ready for the baler. Pedro asked Vega what the problem was and walked away.[64]

That same day, while Vega was working at the baler, he looked up and saw Pedro standing down the aisle with a camera. Pedro took some pictures. At least one picture was of Vega looking at a magazine.

After Pedro finished taking pictures, he told Vega that he should not be reading a magazine during worktime. Pedro also said that someone had told him that Vega was not baling the cardboard fast enough to keep up with the forklift's deliveries. Pedro refused to name his informant. He smiled and began to walk away. Vega began to walk with him. Pedro directed him to get back to work, and remarked that he might not be working for the Company any longer.

Vega returned to work for the remainder of his shift. Later, on the same day, Almaroad came to the baler and asked Vega what had happened. After hearing his explanation, Almaroad left Vega, and returned with two employees to help him complete the work.

[62] I based my findings regarding the safety glasses incident of June 24, on Vega's, Pedro's, Huck's, Bobby Worley's, and Roy Almaroad's testimony. However, there is a conflict in testimony as to whether Pedro was present when Almaroad sent Vega home. According to Worley and Almaroad, it was Almaroad, alone, who confronted Vega on June 24, and sent him home. However, I find from Huck's and Pedro's testimony, that Huck reported the incident to Pedro. It seemed logical to me that, consistent with his active role in the Company's day-to-day operation, Pedro would have followed up on Huck's complaint. Accordingly, I find that Pedro was present, when Almaroad sent Vega home on June 24.

[63] I based my findings of fact regarding the earplug incident of July 2 on Vega's and Pedro's testimony.

[64] According to Roy Almaroad, on August 14 Bobby Worley came to him on the back loading dock and complained that Vega was reading and neglecting his work. Almaroad also testified that he went to check on Vega, and came upon Pedro. However, neither Pedro, nor Worley, nor Vega, corroborated Almaroad's testimony.

Worley, who was a company employee when he testified in these proceedings, impressed me as being a conscientious and objective witness. In contrast, Almaroad seemed more interested in assisting the Company's defense than in giving his full recollection. Accordingly, where Worley's testimony conflicted with Almaroad's regarding conversations and actions on August 4, I have credited Worley.

I have also rejected Pedro's testimony regarding the incident at the baler on August 14, where it conflicts with Vega's and Worley's. I have also accepted Worley's testimony where it differed from Vega's. Of the three, Worley seemed to have the clearest recollection, which he presented in a candid manner. Vega's recollection was not as complete as Worley's. However, Vega seemed to be searching his memory and presenting as much as he could remember without coloring it. Pedro, by his tone and attitude, showed his hostility toward Vega.

Vega came to work on the following Monday, August 18. Almaroad was waiting for him in the breakroom. He told Vega not to clock in, and to sit down. After about a half hour, Pedro came to the breakroom. He announced that he was discharging Vega for reading. Pedro handed a separation of employment notice, dated August 14, to Vega.

The separation of employment notice stated that the Company had discharged Vega for dishonesty, poor work, violation of rules, and insubordination, and that the discharge was ''progressive discipline action.'' The notice explained the reasons for the discharge by reviewing the Company's disciplinary actions against him, beginning on December 16, 1985. On that occasion, Roy Almaroad had issued a verbal warning to Vega for reading a newspaper during worktime. Continuing, the notice listed the warning of April 4, for ''eating in the syrup room,'' the disciplinary action of June 25, for not having his safety glasses on, the disciplinary action of July 3, for wearing ear protection improperly, and the magazine incident of August 14. Finally, the explanation of Vega's discharge declared: ''You are discharged for repeating the offense of reading while on the job, and for persistent violation of rules.''

b. *Analysis and conclusions*

The General Counsel contended that Vega's three written warnings, his two suspensions, and his discharge were unlawful reprisals. The Company denies that union activity had anything to do with these disciplinary steps.

Francisco Vega's name was on the list of the Union's supporters in George Hunnicutt's antiunion letter to the Company's employees, dated February 22. Thereafter, Vega openly supported the Union. Vega signed a union card, distributed union cards to other employees, and attended union meetings. In March or April, he handbilled in plain view of Pedro and Roy Almaroad, at the Norton facility.

In April, Pedro showed that he was very much aware of Vega's adherence to the Union. When Vega asked him to explain the meaning of a letter from the Board to the Union's attorney regarding the latter's request to file a brief out-of-time, Pedro's sarcastic response was that it showed that the Union was ''really taking care of'' Vega.

There can be little doubt that Pedro's sarcasm was accompanied by unexpressed hostility toward the Union and Vega, who openly supported it. The likelihood was that Pedro would do more than joke with Vega. For, as found above, Pedro's animosity toward the Union and those who supported it, moved him to discharge, or otherwise discipline employees in reprisal for their adherence to the Union. Almaroad's unfair labor practices, as found above, showed that he shared Pedro's hostility toward employees who supported the Union.

The timing of the three written warnings, the two suspensions, and the discharge, which Pedro and his lieutenant, Almaroad, imposed on Vega, also supported the General Counsel's contention. During Vega's 4-year employment at the Company, the record shows that all the disciplinary action against him consisted of one written warning, three correction notices, two suspensions, and one separation notice. He received the written warning in December 1985. The Company issued the three correction notices, the two suspensions, and the separation notice after Vega surfaced as an active union supporter. With the addition of this element, the General Counsel's prima facie case was complete. There was ample proof that his union activity was a motivating factor in the punishment which the Company imposed on Vega after he embraced the Union.

The Company contends that there was no showing that union activity was a factor in Almaroad's decision to impose a 5-day suspension on Vega. In support of its position, the Company showed that Vega violated its prohibition against eating and drinking in production areas, during production time. The Company also argued that Almaroad treated Vega leniently.

I find from the testimony of Ernest Delph, Shirley Stidham, and Hester Fields that after the Company posted the prohibition against eating and drinking in the production area, in February, employees on the production line frequently removed bottles of soda pop from the production line and drank without incurring discipline. I find from Delph's uncontradicted testimony that on April 17, while he was working in the production area, Roy Almaroad invited him to drink a bottle of soda pop in the production area. As late as November 10, Delph observed employee Shirley Stidham drinking a 16-ounce bottle of Pepsi-Cola, on the production line, in Almaroad's presence. Between April and November 11, the day he testified, Delph observed employees Bobby Worley, Hester Fields, and Brian Almaroad drinking bottles of Pepsi-Cola, on the production line in Roy Almaroad's presence, without interruption. As far as Delph knew, the Company did not discipline them, and there was no showing that the Company did so.[65]

The laxity which Almaroad and the other production supervisors exhibited toward Stidham, Fields, and others between February and December did not extend to Vega on March 27. Instead of the tolerance extended to those who drank bottles of soda pop on the production line, Almaroad and Pedro punished Vega for drinking hot chocolate in the syrup room. The Company's prohibition of eating and drinking, reposted in February, applied ''anywhere in the plant except the lunchroom.'' It did not make any special reference to the syrup room. Thus, under that policy statement, Vega's violation was not more serious than those occurring on the production line. Yet, Vega's misconduct received the attention of the Company's top plant supervision, Pedro and Almaroad. More important, Pedro and Almaroad singled Vega out for a correction notice and a 5-day suspension.

[65] Employee Stidham testified that employees routinely remove bottles of soda pop from the production line and drink while working. Fields testified that she has seen employees drinking soda pop on the production line, and that she has done so, while production is going on. However, both testified that to their knowledge, no supervisor saw them drinking on the production line. However, neither Stidham nor Fields eliminated the possibility that a supervisor might have observed an employee drinking soda pop without their knowledge. Moreover, I find it unlikely that during the 9 months between February, when the Company reposted its prohibition against eating and drinking in the production area, and December, when Stidham and Fields testified, that they and their colleagues on the production line repeatedly drank bottles of soda, and that no supervisor ever saw them. Both Stidham and Fields testified that they looked to make sure a supervisor wasn't there when they took a bottle of soda pop off the line. However, they did not provide further information on how they escaped detection, as they furtively consumed a 16-ounce bottle of Pepsi-Cola and worked, at the same time. In contrast, Delph testified in detail, and seemed more conscientious about providing his recollection. Stidham and Fields seemed to be answering with caution. Accordingly, I have credited Delph where his testimony conflicted with, or was inconsistent with, Stidham's or Fields' testimony regarding enforcement of the drinking prohibition on the production line.

Nor did the explanation for Vega's plight lay in the Company's notice to employees, dated February 25, which directed compliance with the Pepsi-Cola Company's good manufacturing practices. These regulations called for the elimination of ''eating, smoking, and drinking in any processing area.'' Again, these regulations do not call for special treatment of the syrup room. Drinking Pepsi-Cola on the production line was as much a violation of these regulations as was drinking hot chocolate in the syrup room. Finally, the Company's notice to employees, dated February 25 does not provide for any special punishment for violations of the Pepsi-Cola Company's regulations, as they might effect the syrup room. Thus, there was no ground for the Company's punishment of Vega in any of its regulations or in Pepsi-Cola's regulations. However, that fact does not end the matter.

The record shows that the Company had an unwritten policy regarding food in the syrup room. Vega knew he was violating that policy on March 27. He attempted to evade detection that day, as he went from the breakroom to the storage area in the syrup room, with hot water for his hot chocolate. In September, Roy Almaroad issued a correction notice to employee Howard Pickett, and imposed a 3-day suspension on him for having unwrapped candy in the syrup room. Thus, the Company could have lawfully disciplined Vega for having hot chocolate in the syrup room.

Turning to the extent of the punishment Pedro and Almaroad imposed on Vega, I find that the 5-day suspension was excessive. Almaroad testified that hot chocolate, if spilled, would mold ''very quickly.'' However, assuming that Almaroad's view was valid, soap and water would quickly alleviate the danger. In any event, Vega did not spill his hot chocolate on the syrup room floor. He held on to it, and drank some. According to the notice to employees dated February 25, the punishment for a first violation of the Pepsi-Cola regulations would be dismissal for the rest of the workday. A second violation would incur a 3-day suspension, and a third violation would result in discharge. However, the Company's policy toward a first violation in the syrup room called for a 3-day suspension, as shown by the correction notice which Almaroad issued to Howard Pickett for having unwrapped candy in the syrup room. The Company has not shown that Vega's violation was substantially more serious than Pickett's. The appropriate discipline for Vega would have been a correction notice and a 3-day suspension without pay.

I find that Vega suffered disparate treatment when the Company suspended him for 5 days without pay, on April 4. Almaroad and Pedro seized upon Vega's hot chocolate as a pretext to mask their unlawful motive. Vega's union activity provoked them to add 2 days to his suspension. I also find, therefore, that Almaroad's and Pedro's unlawful motive tainted the last 2 days of this suspension, and that the Company thereby violated Section 8(a)(3) and (1) of the Act.

Following his 5-day suspension, Vega returned to work. There was no showing that he abandoned the Union following his return. However, Pedro showed that he continued to regard Vega as a union adherent. In April, Pedro sarcastically told Vega that the Union was ''really taking care of'' him.

The Company argued that it disciplined Vega on June 24 and 25 because he did not have his safety glasses on as required by plant regulations. However, the record showed that the Company did not uniformly enforce that regulation.

The earliest correction notice for failing to wear safety glasses, which I received in evidence, was Vega's, dated June 25. Almaroad issued correction notices to production employees Paul Church and Jimmy Pitts, on August 11, for not wearing safety glasses. Almaroad also sent each of them home for the rest of their shift. On December 4, Almaroad issued a correction notice to production employee Herman Belemonte, and sent him home for the rest of the day, for not wearing safety glasses. Thereafter, on December 8 and February 17, 1987, respectively, Almaroad issued a correction notice, which was not alleged to have been violative of the Act, and sent an employee home for the rest of the day for failing to wear safety glasses.

However, I find that Darrell Smith, a production employee since 1982, did not regularly wear safety glasses as required by the Company since May 26. Prior to November 10, Smith did not wear safety glasses at all. Even after that date, he did not strictly adhere to the Company's policy. As found below, on December 8, Pedro and Almaroad conversed with Smith, at the back of the plant, when he was not wearing his glasses. When they ended their conversation, Smith was not wearing his safety glasses over his eyes. Again, on January 7, 1987, Smith, while working on the production line, failed to wear safety glasses in Almaroad's presence.[66] Yet, there was no evidence that the Company ever sent him home for part of a workday, or issued any disciplinary notice to him.

On November 10, Roy Almaroad instructed production employee Ralph Waddell to start wearing his safety glasses while working. Prior to November 10, Waddell had worn his safety glasses only when Pedro was in the production area. During the next 3 or 4 days, Roy Almaroad occasionally told Waddell to put his safety glasses on. I have credited Waddell's testimony regarding his compliance with the Company's safety glass regulations only to the extent that Baker did not contradict it. Thus, I find from Waddell's testimony that on a morning in November, Almaroad found him at work without safety glasses and disciplined him with a write-up. However, he permitted Waddell to work for the remainder of the day.[67]

[66] Except for the incident on December 8, I based my findings regarding Darrell Smith's failure to wear safety glasses on John Baker's testimony. Baker testifed about this topic on November 11, in a full and frank manner. The Company called Smith as its witness on December 10 and March 25, 1987. On the earlier date, neither the Company's counsel nor counsel for the General Counsel examined Smith on his compliance with the Company's safety glass requirements, prior to November 10. On March 25, neither the Company's counsel nor counsel for the General Counsel gave Smith an opportunity to testify fully about his compliance with the safety glass regulation. The Company's counsel posed a leading question which was vague. Counsel's careful approach, and Smith's quick ''No'' did not rebut Baker's forthright testimony. Nor did Roy Almaroad's negative response to a leading question. These factors and Baker's demeanor persuaded me to credit his testimony. While Baker erred on some dates, he seemed anxious to provide accurate information to the best of his recollection. Accordingly, I did not credit Almaroad's testimony that he uniformly enforced the Company's safety glass regulation.

[67] Roy Almaroad denied observing Ralph Waddell and Darrell Smith violating the Company's eyeglass policy. His denials came in response to leading questions. Almaroad did not provide a detailed account of his observations. As Baker came across as the more forthright witness, I have rejected Almaroad's denials and credited Baker.

I find from Baker's testimony that in February 1987 Almaroad employed a delivery employee for 1 day in production. The employee worked without safety glasses. Supervisor Robbie Mullins and Almaroad were present in the plant and had opportunity to see the employee. The employee worked the entire shift without glasses and without any interference from Mullins or Almaroad.

Waddell's conduct suggested that in his view, Pedro was strict and Almaroad was willing to look the other way. If that were the case, I would not find a violation here. The record showed that Almaroad was not consistent in his enforcement of the Company's safety glass regulation. However, Waddell's conduct also indicated that Pedro was on the plant floor on occasion. Thus, it seems unlikely that Darrell Smith, who never wore his safety glasses until November 10, would not have had at least one confrontation with Pedro between May 26 and November 10. In any event, Pedro maintained enough control over the plant's management to be aware of, and tolerate, Almaroad's inconsistency.

Had the Company applied its safety glass regulation as strictly as it claimed it did, Almaroad would have sent Waddell home, and disciplined Smith with a correction notice and loss of working hours. Almaroad did not do so. However, Almaroad and Pedro applied it strictly to Vega on June 24 and 25. Thus, I find that Almaroad's imposition on Vega of a correction notice, on June 25, and a suspension for the rest of the workday, on June 24, was disparate treatment. *Bliss & Laughlin Steel Co*., 266 NLRB 1165, 1173 (1983).

In light of the General Counsel's strong showing, as set forth above, I find that Vega's union activity was the motivating factor in Pedro's and Almaroad's decision to punish him on June 4 and 25. Accordingly, I find that by inflicting that punishment upon Vega, the Company violated Section 8(a)(3) and (1) of the Act.

I now turn to the Company's explanation of the correction notice, which Almaroad issued to Vega on July 3. The Company insisted that Almaroad issued this correction notice only because Vega wore his earplugs improperly.

The Company's notice to its production employees, dated May 22, directed them to wear their earplugs, while production was in progress. The Company furnished each production employee with a set of earplugs. The instructions accompanying the cylindrical earplugs, directed that they be inserted well into the ear canals.

The Company showed that Pedro strictly enforced the earplug regulations. His treatment of Vega and employee Carlos Field exemplify Pedro's consistency in this regard. On July 2, Pedro saw Vega's earplugs inserted sideways, into the opening of the ear canals. Pedro prepared a correction notice for Vega on July 2, but did not send him home. It was too late in the day. Almaroad presented the correction notice to Vega on July 3. Pedro did not penalize Vega by taking any working hours away from him for this infraction.

In December, Pedro issued a correction notice to Carlos Fields for operating a forklift recklessly and failing to wear his earplugs properly, but did not send him home. Although the incident occurred early in the day, Pedro used discretion. As Fields was the only available forklift driver, he did not send Fields home, as the earplug regulations prescribed. However, at a later date, Pedro took the equivalent hours of work away from Fields. The General Counsel did not allege that this disciplinary action violated the Act.

Almaroad did not strictly enforce the earplug rule. He issued a correction notice to employee Bobby Worley, on August 5, and sent him home for the rest of the day, as prescribed in the Company's earplug regulations. However, on January 6 and 7, 1987, Almaroad permitted employee Darrell Smith to work in production without wearing earplugs properly. Almaroad did not discipline Smith on either occasion. In February, Almaroad permitted a nonproduction employee to work without earplugs for 1 day in production.

Here, there was no showing that Darrell Smith violated the earplug regulation with sufficient frequency to have caught Pedro's notice. Instead, the record showed that Pedro enforced the regulations against both Vega and Fields. Of the two, only Fields, whose punishment was not the subject of an unfair labor practice allegation, suffered a loss of wages. I find that Vega did not receive disparate treatment from Pedro.

Pedro's treatment of Fields in December showed that he would have reacted to Vega's infraction with a correction notice, even if Vega had not been a union supporter. I find that the Company did not violate Section 8(a)(3) and (1) of the Act, by issuing a correction notice of Vega on July 3. I shall, therefore, recommend dismissal of the complaint allegation that it did.

I find no merit in the Company's claim that it discharged Vega because he read on the job and for ''other lawful reasons.'' Pedro testified that reading on the job was sufficient ground for discharging Vega. However, according to Pedro's testimony, he found that Vega's correction notices, for drinking hot chocolate, failing to wear protective glasses, and failing to wear earplugs properly ''aggravated the situation'' and he decided to discharge Vega. When he made this decision, Pedro knew that Roy Almaroad had found Vega reading on the production line on December 16, 1985, and had issued a warning that Vega would be discharged for a repetition. I also find, from Almaroad's testimony that he recommended that Pedro discharge Vega for again reading on the production line. This recommendation, and the two correction notices, respectively, for drinking hot chocolate and for not wearing safety glasses provided further support for the General Counsel's case.

Almaroad's recommendation was contrary to his stated policy of not counting a warning against an employee after 6 months. According to Almaroad, ''a man deserves a break if, after 6 months, he's straightened his act up and starts it again.'' The only exception Almaroad made in this policy was for violations of Federal regulations requiring safety glasses and earplugs. Here, Vega's second reading offense occurred 8 months after the first such incident. Thus, when Almaroad recommended discharge on or about August 14, he was departing substantially from his policy. In light of his demonstrated hostility toward employee union activity, I find that Almaroad departed from his stated policy, to help rid the Company of a union supporter.

The other ''lawful reasons'' included the disciplinary actions which the Company imposed upon Vega in April, for drinking hot chocolate in the syrup room, and in June, for not wearing safety glasses. Thus, Pedro based his decision on Almaroad's discriminatory recommendation and two discriminatory correction notices. Far from rebutting the Gen-

eral Counsel's prima facie case, these facts support a finding of unlawful reprisal. I find that Pedro seized upon Vega's glances at a magazine as the final ground for punishing him for his role in the Union's organizing campaign. I further find, therefore, that by Pedro's discharging Francisco Vega on August 18, the Company violated Section 8(a)(3) and (1) of the Act.

12. Sam Sanders

a. *The facts*

The Company employed Sam Sanders as a laborer from the spring of 1985, until his discharge, on January 6, 1987. In February, early in the Union's campaign, Sanders signed a card supporting it. The Union listed Sanders as a member of its in-plant organizing committee, in its letter to the Company, dated February 18. In February and March, Sanders handed out cards and literature for the Union, outside the Company's Norton plant. Sanders also testified in these proceedings, as a witness for the General Counsel, on November 7 and again on March 24, 1987.

On July 2, Sanders was stacking bottles at the Norton plant when Pedro came upon him. After criticizing Sanders' stacking, Pedro walked away to where Roy Almaroad was standing. Pedro called Sanders to where he was standing, and told him to look at the stacks. As he was looking, Pedro pulled Sanders' face to one side, and told Almaroad to look at Sanders' earplugs. Pedro remarked that he should send Sanders home. Sanders was wearing his earplugs sideways, contrary to instructions on the little bag in which they came to the employees. Sanders returned to his work.

Pedro prepared a correction notice for Sanders. However, Sanders worked for the remainder of the shift and went home. He returned to work on July 3. Sanders went on vacation on July 6. He did not return to work until July 13. On that date, Almaroad gave the correction notice to Sanders.

The correction notice showed that Sanders had broken a rule or regulation. In explanation of the reasons for the corrective notice, Pedro wrote that he had seen Sanders wearing his earplugs sideways in his ear. In the portion of the corrective notice which calls for a statement of the corrective action, Pedro asserted that this was a first warning. He also stated that the Company had not sent Sanders home because the workday was over. The notice warned that if Sanders thereafter violated either the safety glass regulation or the earplug regulation, he would incur a 3-day suspension.[68]

On December 8, at Roy Almaroad's direction, Sanders and employees Dave Waddell and Ernest E. Delph were removing wooden forms from the newly poured concrete floor, and cleaning up, in the can room, at the rear of the plant. The three were working without safety glasses.

As the employees were finishing the work, Pedro came to Sanders and asked him where his safety glasses were. Sanders answered that they were in his coat pocket. After responding sarcastically to Sanders, Pedro went to Delph and Waddell. He found them working without glasses and asked for their explanations. Waddell said he had forgotten his. Delph said he did not know that he was required to wear glasses, where he was working.

Pedro walked away from the three employees. Employee Darrell Smith appeared in a doorway, at the back of the plant, without safety glasses on. Pedro and Almaroad stopped to talk to Smith. After a brief exchange, the three went their separate ways.

Pedro went to his office and obtained three correction notices. He gave them to Almaroad with instructions to write up Sanders, Waddell, and Delph.[69]

The three employees soon stopped work and proceeded toward the timeclock to punch out. However, enroute, they met employee Bobby Worley, who directed them to see Supervisor Robbie Mullins in the boiler room. Sanders, Waddell, and Delph immediately went to the boiler room.

Mullins handed a correction notice to each of them. Sanders signed his notice, but wrote ''under protest'' above his signature. Delph did likewise. Waddell signed his notice without protest. Delph asked Mullins if the Company intended to do something about Smith. Mullins answered not that he knew of.

[68] I based my findings regarding Sanders' employment and union activity on his uncontradicted testimony.

Sanders' testified that the earplug incident occurred on June 19. However, under cross-examination, he conceded that in his pretrial affidavit he gave July 2 as the date. In any event, Pedro's testimony before me and the correction notice agreed that the incident occurred on July 2. Accordingly, I have rejected Sanders' testimony, and have credited Pedro's in this regard. I have also credited Pedro's testimony regarding the position of Sanders' earplugs on July 2. Sanders signed the correction notice on July 3 without challenging its contents, which corroborated Pedro's testimony about the position of Sanders' earplugs. Sanders did not deny that he had inserted his earplugs sideways on July 2. He seemed reluctant to testify with specificity about their positions at the time he encountered Pedro.

[69] There is disagreement among the General Counsel's witnesses regarding what happened on December 8. According to Sanders, Almaroad saw him, Delph, and Waddell without their glasses, but said nothing. Sanders testified that he was standing by himself, next to the can room door, when Pedro asked him about his safety glasses. Sanders also testified that after he told Pedro that his glasses were in his coat pocket, Pedro assured him that ''we'd let it ride this time.''

Delph testified that Almaroad ''hollered and told us to put our glasses on and we put them on.'' Delph also testified that he saw Darrell Smith standing at the back of the plant, without glasses, talking to Almaroad and Pedro, and that he asked Mullins how the Company would treat Smith. Sanders, who was present when Delph spoke to Mullins, did not corroborate Delph's testimony regarding these two assertions. Sanders testified that Brian Almaroad met them and directed them to Robbie Mullins. According to Delph, it was Bobby Worley who told them to see Mullins. However, of the two, Delph seemed more conscientious about searching his memory and providing his full recollection. Accordingly, where their testimony differed regarding the safety glass incident on December 8, I have credited Delph.

Pedro's and Delph's testimony regarding the safety glass incident of December 8, differed with respect to Darrell Smith. Pedro provided detailed testimony about his confrontation with Sanders, Delph, and David Waddell, and his response to their failure to wear safety glasses. However, he did not deny seeing Darrell Smith and talking to him in the presence of those three employees on December 8. Instead, Pedro answered no to a broad leading question about whether he ever observed Darrell Smith ''in violation of either the eye or ear protection policy.''

Roy Almaroad did not deny that on December 8, he and Pedro conversed with Darrell Smith. Nor did Almaroad provide detailed testimony regarding Smith's compliance with the safety glass policy. Instead, he answered no, when company counsel, on direct examination, asked him if he had observed Smith violating that policy.

Darrell Smith did not deny that on December 8, he conversed with Pedro and Roy Almaroad. Instead, he answered no to a leading question by the Company's counsel, who asked whether during the 6 months preceding March 25, 1987, the day of his testimony, he, Smith, did not wear his safety glasses in a place where he should have worn them.

Neither Pedro, Almaroad, nor Smith testifed contrary to Delph's account of a conversation on December 8, including them and Almaroad. The Company's counsel carefully led Pedro, Almaroad, and Smith over the latter's observance of the safety glass regulations. These factors, and my impression that Delph was giving his full recollection in a frank manner, persuaded me to credit his testimony regarding Darrell Smith's safety glasses, and Smith's conversation with Pedro and Roy Almaroad on December 8.

Sanders and Delph also received 3-day suspensions, and were to report back to work on December 11. However, after learning that Delph had not previously violated the Company's ear or eye safety regulations, Roy Almaroad reduced the punishment to suspension for the balance of December 8. Sanders' correction notice stated that he ''was warned of this violation before.'' This reference was to his earplug violation on July 2. As this was his first offense, the Company sent Waddell home for the remainder of the day.

On July 7, the Company announced that a first violation of either the eye protection regulation or the ear protection regulation would count as the first offense in its progressive discipline system. The second violation of either regulation would incur a 3-day suspension. Finally, a third offense would result in the offender's discharge.

Sanders was absent from work on December 9 and on the next two Tuesdays. On December 9, Sanders was serving the second day of his 3-day suspension. He was absent on December 16 because his truck was in disrepair. Sanders telephoned the Norton plant and told an unidentified woman who answered the phone, of his plight.

When Sanders came to work on the morning of December 17, Almaroad approached him. Almaroad said that Sanders' absences were excessive, and that he must correct the situation. Almaroad warned that he was putting a verbal correction in Sanders' file. Almaroad also said that if Sanders did not correct his absences, disciplinary action would follow.[70]

At about 6 a.m., on December 3, Sanders called the Norton plant. He reported to the same unidentified woman that he would be absent that day because he was sick.

When Sanders was waiting to clock in at work on December 24, Roy Almaroad said he wanted to talk to him. Sanders proceeded to the palletizer, where Almaroad and Supervisor Robbie Mullins were waiting. Almaroad remarked that Sanders had missed 1 day each week for the last 3 weeks. He also announced that he was about to send Sanders home for the balance of the day, and directed him to bring a doctor's excuse when he returned to work. Almaroad issued a correction notice to Sanders for absenteeism.[71]

The correction notice explained that in the last 3 weeks, Sanders had been absent ''a day a week.'' The notice also stated, in substance, that Almaroad had talked to Sanders about his absences. The correction notice announced that Sanders would suffer a 1-day suspension and that a repetition of his absences ''could result in discharge.''

Sanders returned to work after his 1-day suspension with a doctor's excuse to cover his absence on December 23. He presented it to Almaroad. There was no showing that Almaroad responded.

On January 26, 1987, Almaroad assigned Sanders to operate the caser for the nonreturnable bottles. Pedro came to where Sanders was working and then walked away. Pedro returned with office employees Strawberry Hunnicutt and Danny Ridings, and stood with them a short distance from Sanders. Pedro summoned Sanders, to where he and his two companions were standing. Pedro ordered Sanders to turn his head sideways, so that all could see his ears. Sanders was wearing his earplugs sideways.[72]

Pedro told Sanders to punch the timeclock and the two went to the breakroom. Pedro left Sanders and returned with a separation of employment form. The form announced Sanders' discharge for three violations of the Company's eye and ear protection regulations. The form recited the details of the most recent earplug violation and reviewed, summarily, Sanders' two previous violations. The Company has not offered to reemploy Sanders.

Pedro told Sanders to punch the timeclock and the two went to the breakroom. Pedro left Sanders and returned with a separation of employment form. The form announced Sanders' discharge for three violations of the Company's eye and ear protection regulations. The form recited the details of the most recent earplug violation and reviewed, summarily, Sanders' two previous violations. The Company has not offered to reemploy Sanders.

b. *Analysis and conclusions*

The General Counsel alleged that the Company gave a warning to Sanders on July 17, because of his union activity, and thereby violated Section 8(a)(3) and (1) of the Act. The General Counsel went on to allege that the Company violated Section 8(a)(4), (3), and (1) of the Act, when it warned Sanders and suspended him for 3 days on December 8, warned him and suspended him for 1 day, on December 4, and then discharged him on January 26, 1987, because of his union activity, and because he testified in these proceedings. The Company sought dismissal of these allegations on the ground that the General Counsel had failed to show discrimination based upon union activity or participation as a witness in these proceedings. According to the Company, the record showed that it disciplined and then discharged Sanders because of his misconduct.

[70] Sanders denied that Almaroad ever talked to him about his absences or gave any verbal correction or warning to him. However, he did not deny that Almaroad approached him and spoke to him on December 17. Further, the Company showed that on December 17, Almaroad prepared a verbal correction notice regarding Sanders' absences from work. I also noted that Almaroad testified about his remarks to Sanders in a forthright manner. For these reasons, I credited Almaroad's testimony that he counseled Sanders for 2 or 3 minutes, and warned that he was putting a verbal correction notice in Sanders' file.

[71] According to Almaroad and Mullins, Sanders attributed his absences of December 9 and 16, to sickness and blamed his third absence on the breakdown of his truck. I find it unlikely that Sanders would have asserted sickness as the reason for his absence on December 9. Sanders' was well aware that December 9 was included in the suspension which the Company imposed on him on December 8. Also, on cross-examination by counsel for the General Counsel, Almaroad seemed to qualify his responses regarding what he was referring to in his remarks to Sanders on December 17, and whether Mullins was present. Of the three, Sanders appeared more conscientitious ahout searching his memory and providing his best recollection of his encounter with Almaroad and Mullins on December 24. I have, therefore, credited his version of his and Almaroad's remarks on December 24.

I also noted Almaroad's and Mullins' testimony showing their respective roles in that suspension, and their recollections that December was part of that suspension. Thus, even if Sanders had erred in blaming illness for his absence on December 9, Almaroad and Mullins knew that sickness had nothing to do with that absence.

[72] Sanders testified on March 24, 1987, that he always wore his earplugs rolled up, and stuck part of the way down in his ears. However, on November 7, when he first testified about his use of earplugs, he was reluctant to provide such detailed information. When asked to describe where he was wearing his earplugs, when Pedro first disciplined him for not complying with the Company's regulations, Sanders testified that they were in his ears. I did not rely on that testimony. Instead, I credited Pedro's testimony that on July 2, he saw Sanders wearing his earplugs side ways. Thus, Sanders' testimony on March 24 did not square with my earlier finding. Again, I did not rely on Sanders' testimony on the placement of his earplugs. Instead, I relied upon the frank and detailed testimony of Roy Almaroad, Strawberry Hunnicutt, and Danny Ridings. Pedro's strict enforcement of the earplug regulations, shown in the record, and the inconsistency in Sanders' testimony pursuaded me not to credit his later, self-serving testimony.

In February, Sanders signed a card for the Union, attended its meetings, and joined its plant organizing committee. On February 21, the Company learned of Sanders' sentiment, when the Union's letter arrived, showing that he belonged to the organizing committee. Sanders reminded the Company of his prounion sentiment, when he stood near its plant, in February and March, passing out union literature.

On July 2, Sanders afforded the Company an opportunity to punish him. He wore his earplugs sideways, outside the ear canal, while stacking nonreturnable bottles, at the Norton plant. Pedro saw the position of Sanders' plugs, and brought Roy Almaroad to see them. The instructions on the earplug containers which the Company had issued to Sanders and the other plant employees were to insert them into the ear canal. Sanders had violated the Company's ear protection regulations. However, there was evidence that other employees had not worn earplugs, as required by those regulations, and had escaped punishment.

On the following day, Pedro prepared a correction notice for issuance to Sanders. However, Sanders left the plant on July 3, before Pedro had completed the notice. Sanders did not return to the plant until July 17. On that date, Almaroad gave him the notice. The correction notice included a warning that a further violation of either the ear or the eye protection regulations would result in a 3-day suspension.

I find that the General Counsel has produced sufficient evidence to support an inference that Sanders' union activity was a motivating factor in Pedro's decision on July 2 to impose a disciplinary warning on Sanders. The letter announcing Sanders' support for the Union provided Pedro and Almaroad with knowledge of his active support for the Union. I also find that Sanders' open handbilling, near the Norton plant, in February and March was known to Pedro and Almaroad. Both Pedro and Almaroad showed a persistent hostility toward employees who supported the Union's organizing effort among the Company's employees. As I have found above, this hostility provoked them to resort to pretext in punishing employees for assisting the Union. I have also found that they were likely to use disparate punishment as a reprisal against union activists. Sanders was a likely target of such discriminatory treatment at Pedro's hands.

However, the Company has shown that Pedro would have disciplined Sanders for violating the earplug regulations even if he had not engaged in union activity. Thus, as I found above, at page 89, there was no showing that Pedro permitted any production employee to work without earplugs properly inserted. On the contrary, his treatment of production employee Carlos Fields showed that unlike Almaroad, who was inconsistent, Pedro insisted on compliance with the earplug regulations, without regard to whether the offending employee was supporting the Union or not.

Pedro did not deprive Sanders of any hours of work for violating the ear plug regulations. He issued a correction notice and warned Sanders. Thus, Pedro followed the procedure set out in the regulations for a first offense. In sum, I find that the correction notice and the warning it contained, dated July 3, which the Company issued to Sanders on July 17, did not constitute unlawful discrimination against him. Therefore, I find that the Company did not thereby violate Section 8(a)(3) and (1) of the Act, as alleged. I shall recommend dismissal of that allegation.

The remaining alleged instances of discrimination against Sanders occurred after he testified on behalf of the General Counsel, on November 7. The first alleged instance of discrimination occurred on December 8, when the Company inflicted a 3-day suspension on Sanders. The General Counsel contended that the Company seized upon Sanders' failure to wear safety glasses as a pretext. According to the General Counsel, the Company violated Section 8(a)(4),[73] (3), and (1) of the Act, by issuing a warning to Sanders and suspending him for 3 days, because he supported the Union, and testified at the hearing on November 7. The Company urged dismissal of these allegations on the ground that the General Counsel failed to show that either union activity, or testimony at the hearing before me, played any part in the decision to discipline Sanders on December 8. The Company also argued that the evidence showed that it disciplined Sanders on that occasion, only because he did not wear safety glasses.

Sanders' failure to wear his safety glasses on December 8, provided further opportunity for Pedro to punish him. The passage of 9 months since Sanders' handbilling may have tempered Pedro's hostility somewhat. However, his testimony on March 24 and 25, 1987, revealed another factor which may have revived Pedro's animosity sufficiently to precipitate the warning and suspension which he inflicted on Sanders, on December 8.

In his testimony before me on March 24 and 25, 1987, Pedro conceded that he believed that employees, who had previously testified against the Company in these proceedings, in his presence, frequently lied. He also admitted that his perception that they had lied had angered him. In particular, Pedro singled out Sanders as one of those who had lied.

By December 8, 9 months had passed since Sanders' last overt union activity. During that period, the Company had not committed any unfair labor practice against Sanders. Further, on November 7, 1 month prior to Pedro's decision on December 8 to punish him, Sanders testified on behalf of the General Counsel. By so doing, he incurred Pedro's displeasure. From these circumstances, I find it unlikely that Sanders' union activity was a factor in Pedro's decision to punish him on December 8. I shall, therefore, dismiss the allegation that the warning and suspension which the Company imposed upon Sanders on that date, violated Section 8(a)(3) of the Act.

However, Pedro's admission that Sanders' testimony on November 7 angered him supports the contention that the warning and suspension violated Section 8(a)(4) and (1) of the Act. The timing of the adverse action so soon after Sanders had testified in this hearing, and Pedro's previous resort to disciplinary action to punish employees for engaging in protected activity, provided further evidence that Sanders' testimony on the General Counsel's behalf in these proceedings was a motivating factor in that decision.

The Company attempted to show that Sanders' violation of the eye protection regulations was the sole reason for Pedro's decision to punish Sanders on December 8. However, I have found that Pedro did not strictly enforce those regulations. An instance of his forbearance occurred on that same day, shortly after he had scolded Sanders, Delph, and Dave

[73] Sec. 8(a)(4) of the Act provides that:
It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

Waddell. Pedro and Almaroad came upon Darrell Smith, who was not wearing the required safety glasses, and took no corrective action. By this conduct, Pedro showed that he exercised discretion in the enforcement of the eye safety regulations. Pedro also demonstrated by this forbearance that he might not have punished Sanders in the absence of the latter's protected conduct.

The Company has not rebutted the General Counsel's showing that Sanders' testimony in these proceedings was a motivating factor in Pedro's decision to issue the correction notice and warning of December 8, which also announced Sanders' 3-day suspension. Accordingly, I find that by these adverse actions, the Company violated Section 8(a)(4) and (1) of the Act.

The Company's explanation of Almaroad's issuance of a correction notice to Sanders, on December 24, for excessive absence, with a 1-day suspension, and a warning that further absence ''could result in discharge,'' did not withstand analysis. According to the Company, and Almaroad, he disciplined Sanders in this instance for being absent from work on December 9, 16, and 23. By including December 9 as an unexcused absence, Almaroad seemed anxious to dredge up some excuse to punish Sanders. He must have known that December 9 was included in the suspension he had imposed on Sanders as punishment. This was not a lapse in memory. For on December 17, with Pedro's approval, Almaroad had issued a verbal correction notice to Sanders for being absent on December 9 and 16.

Pedro also gave his blessing to Almaroad's intention, announced on December 17, to suspend Sanders if he ''missed another day without an adequate excuse.'' Thus, according to Pedro and Almaroad, a disciplinary suspension was not an adequate excuse for Sanders' absence on December 9. This deliberate mischaracterization of a company-imposed absence strongly suggested that Pedro and Almaroad had discovered a pretext for punishing Sanders on December 17, and again on December 24.

There was further evidence of the pretextual nature of the proffered excuse for disciplining Sanders on December 24. According to Pedro's testimony, an adequate excuse for an employee's absence would be sickness, provided the employee supported his or her claim with a doctor's note. When Sanders returned to work on December 24, Almaroad told him to bring a doctor's note to cover his absence on December 23. Almaroad did not wait to see if Sanders could obtain such a note to support his claimed illness. He disciplined Sanders with a warning and a 1-day suspension. When Sanders returned to work with the doctor's note, Almaroad and the Company ignored it.

Almaroad's practice was to talk to an employee about his or her absenteeism, before writing his or her verbal correction notice. However, in the case of Sanders, Almaroad wrote the verbal correction on December 16, and issued it on the next day. Almaroad was apparently in a hurry to begin the progressive discipline process, and had no intention of losing this opportunity.

I find from the foregoing, that Almaroad, with Pedro's concurrence, used Sanders' absences on December 9, 16, and 23 to camouflage the real reason for punishing Sanders. Prior to December 17, the Company had not said anything to Sanders about his attendence. However, on December 17, the Company hastened to discipline him for two absences, one of which it had imposed on him as punishment. This attempt to compound the impact of the punishment it had imposed on Sanders on December 8 reflected the Company's aggravated hostility toward him. I find that Sanders' testimony on November 7, in these proceedings, was the only factor which provoked the Company to issue the verbal correction notice dated December 16, and the correction notice dated December 24, to Sanders. I find that both disciplinary actions violated Section 8(a)(4) and (1) of the Act.[74]

I also find that Pedro unlawfully discriminated against Sanders by discharging him. The notice which the Company issued to Sanders on January 26, 1987, listed three violations of the Company's eye and ear safety regulations as grounds for discharging him. Included was the correction notice of December 8, which I found violated Section 8(a)(4) and (1) of the Act. Thus, the Company could not lawfully count that correction notice as representing a violation of its eye and ear regulations. By relying on that unlawful correction notice, I find that the Company discriminated against Sanders. His failure to comply with the earplug regulation on January 26, was only his second offense under the ear and eye regulations. The appropriate punishment for that offense was a 3-day suspension. By inflicting a discharge, Pedro violated Section 8(a)(4) and (1) of the Act. However, I shall recommend dismissal of the allegation that Sanders' discharge violated Section 8(a)(3) of the Act.

13. Ernest E. Delph

a. *The facts*

The Company employed Ernest E. Delph from July 1984 until it discharged him on May 21, 1987. Delph was a production employee. Roy Almaroad supervised him.

Delph actively supported the Union. He signed a card for the Union, handbilled four or five times, at the Norton plant, after work, and asked other employees to sign cards for the Union. Delph attended five or six union meetings and joined the Union's plant committee. On March 24, the Company received a letter from the Union identifying Delph as a committeeman.[75]

Supervisor Robbie Mullins showed early interest in Delph's union activity. As found above, soon after the Union's meeting of February 16, Supervisor Mullins asked Delph how the meeting had gone. Delph answered that he did not know, and had not been there. Mullins rejected Delph's answer, and insisted that Delph had attended. Delph returned to operating the palletizer, without further comment.

Delph wore Teamsters buttons on his hat, while working on the production line, at the Company's Norton plant, on April 16 and 17. On the latter date, Delph noticed Pedro and Huck standing and talking some distance from his workstation. Delph thought they might be pointing at him. Delph removed the union buttons.

[74] The General Counsel, by motion in her posthearing brief, for the first time, raised the verbal correction notice as a violation. The verbal correction notice of December 16 was an element in the correction notice and 1-day suspension which followed on December 24. Further, the parties fully litigated the facts regarding the verbal correction notice. I also find that the verbal correction notice of December 16 sufficiently relates to the other allegations of discrimination against Sanders. For these reasons, I have granted the General Counsel's motion. *Waco, Inc.*, 273 NLRB 746, 749 fn. 13 (1984).

[75] I based my findings regarding Delph's employment background and union activity on his uncontradicted testimony.

On March 13, Pedro gave a verbal correction notice to Delph and sent him home for the balance of the day for having an offensive body odor. Before sending him home, 1 hour early, Pedro took Delph to the breakroom and showed him the notice to employees, which included regulations regarding ''personnel hygiene and practices.'' Pedro warned Delph that a second offense would bring on a 3-day suspension, and a third offense would cause his discharge. Pedro told Delph to leave and not return until he had cleaned up.

I find from John Baker's uncontradicted testimony that in the summer of 1985, Delph had a body odor problem at work. However, the record shows no company reaction to Delph's problem prior to March 13.

Soon after March 13, Roy Almaroad spoke to Delph twice about his body odor. On the first occasion, Almaroad put his arm around Delph and asked if he had his deodorant on. Delph answered yes. Almaroad said he did not mean to hurt Delph's feelings, and that ended the discussion.

On the second occasion, Almaroad asked Delph if he had his deodorant on. Delph answered yes. Almaroad said that in his youth, he had sweated profusely, and had put cologne on his shirt. Alrnaroad asked if Delph would do the same.

On the morning of May 12, Delph was repairing pallets. Pedro, while passing through the plant, came close to Delph and decided that he ''smelled bad again.'' Pedro asked Almaroad to check on Delph, and if he agreed that Delph smelled, then carry out the appropriate punishment. Almaroad checked and found that Delph had a bad body odor. Almaroad immediately prepared and served a correction notice on Delph. The correction notice stated that the reason for its issuance was ''Higine [sic] odor about body. This is a food plant.'' The corrective action shown on the notice was a warning and a 3-day suspension.

Not satisfied with the language in Almaroad's correction notice, Pedro composed a memorandum entitled: ''Note to File of Ernie Delph.'' Pedro's memo, which he attached to the Company's file copy of the correction notice issued to Delph on May 12, reported Delph's very offensive body odor, how far Pedro was standing from Delph at the time of the incident, and Pedro's opinion as to the cause of Delph's odor. Pedro's memorandum also reported his instructions to Almaroad on May 12 regarding disciplinary action.[76]

Before Delph left the plant, on May 12, he had face-to-face conversations with employees John Baker, Kenneth Allen, Curtis Allen, and Derek Harmon. Delph asked Kenneth Allen if he thought Delph ''stunk.'' Kenneth Allen answered no, and signed Delph's correction notice. Delph asked Baker the same question. Baker walked around Delph, sniffed, and answered no. Baker also signed Delph's correction notice.

Almaroad showed genuine concern ahout Delph's body odor problem. A few days after Delph's suspension, Almaroad asked employee John Baker to talk to Delph ahout his body odor problem. Almaroad said he did not want to write Delph up, but he had to obey Pedro. He also said that if he had his way, he would not have issued the correction notice. Almaroad said he considered Delph to be a pretty good employee and liked him.[77] In his testimony on cross-examination before me, on December 16, Almaroad conceded that since May 12, he had checked ''a couple of times'' and found that Delph had corrected his body odor problem.

Delph testified for the General Counsel in these proceedings, on November 11, in Pedro's presence. In his testimony on March 24, 1987, Pedro conceded that he believed that Delph had told falsehoods on the witness stand. This perception angered Pedro, while he was listening to Delph's testimony.

On the morning of December 2, Roy Almaroad assigned Delph to repair pallets, put them in the pallet dispenser, and watch the pallets emerge to avoid blockages. Delph finished repairing pallets. Delph's practice upon completing an assignment for Almaroad was to look for him and ask for another assignment. On this occasion, Delph tried to do just that. Delph went walking through the plant to find Almaroad. After a futile search, Delph returned to his work area, stacked a few pallets, stood near the palletizer for a while, and then began walking.

Pedro approached Delph and asked him how long he had been standing there. Delph said that he had been repairing pallets, putting them in the dispenser, and watching them as they emerged from it. Pedro replied that putting pallets in the dispenser was not his work, it was work for the forklift drivers. Delph asked if Pedro wanted him to get Ralph Waddell to perform that task. Pedro told Delph not to cross-examine him, and asked if he had told anyone that he was through. Delph answered no, adding that he could not find Almaroad. Pedro accused Delph of wasting time and suggested that he and Delph look for Almaroad.

Delph and Pedro found Almaroad. Pedro complained that Delph was wasting time. Almaroad offered to find something for Delph to do. Pedro said he intended to write Delph up. Almaroad volunteered to relieve Pedro of that chore. Pedro departed. Almaroad ordered Delph to clean up around the palletizer, and left, saying he would return.

When Almaroad returned, he gave a correction notice to Delph. The notice stated that the reason for the written correction was: ''Unsatisfactory Work Performance.'' The notice explained that the reason for the corrective action was ''not performing his work duties.'' Finally, the correction notice described the ''Type of corrective action given'' as follows: ''Warned this could lead to more severe disiplian [sic] or dismissal.''[78]

On December 8, Supervisor Robbie Mullins issued a correction notice to Delph for not having safety glasses on. The correction notice announced that Delph was suspended for

[76] I based my findings regarding the preparation of the correction notice of May 12, upon Pedro's and Almaroad's testimony which dovetailed in a logical pattern and which they gave in a frank manner, without apparent embellishment. Comparing Delph's positive assertions on direct testimony with his repudiation of some of those assertions on cross-examination, and observing his somewhat selective memory, as reflected during cross-examination, I have rejected his account of the events leadinJ np to his receipt of the correction notice on May 12.

[77] I based my findings regarding Almaroad's remarks to Baker about Delph, upon Baker's testimony. As he gave this testimony in a blunt, disinterested manner, Baker persuaded me that his account was reliable. Almaroad's somewhat sketchy account of those remarks confirmed a substantial part of Baker's version.

[78] I based my findings of fact concerning Delph's correction notice of December 2, upon his testimony, which was largely uncontradicted. Where there were conflicts or inconsistencies between Delph's testimony and Pedro's regarding their confrontation on that date, I have accepted Delph's version. In assessing credibility here, I noted that Pedro seemed anxious to portray Delph as insubordinate, and did so in a tone which suggested extraordinary hostility toward him. Delph gave his testimony in a calm, dispassionate manner.

the remainder of the day and warned that a further violation of the Company's eye or ear protection regulations would result in a 3-day suspension. I have set forth my findings of fact regarding this disciplinary action, above.

On March 24, 1987, after Pedro had testified, Delph again testified for the General Counsel. Approximately 2 months later, at about 6:20 a.m., on May 21, 1987, Delph returned to work, after an absence due to an injury. Delph went to the breakroom, where he encountered John Culves, who was acting as a supervisor. Delph presented a written doctor's excuse, which Culves examined and returned. Culves instructed Delph to wait and talk to Pedro. Delph remained in the breakroom waiting for Pedro.

Pedro arrived at the Company's Norton plant at about 8:30 or 9 a.m. At first, Pedro asked Delph if he intended to report accidents immediately in the future, instead of waiting. Pedro was impatient with Delph's initial equivocal response, and pressed him for a yes.

As they spoke, Pedro perceived that Delph had a strong, unpleasant body odor. After asking Delph to move to Sales Manager Bob Lee's office, Pedro asked Lee, Supervisor Buddy Messer, Strawberry Hunnicutt, and office employee Danny Ridings to approach Delph, and check his odor. All agreed with Pedro.

As soon as Pedro had achieved confirmation of his opinion that Delph had a strong and obnoxious body odor, he discharged him. Pedro completed the separation of employment form himself. He indicated on the form that Delph had violated the Company's rules. Pedro went on to explain that he had violated ''hygiene standards'' for the third time, and that the Company's rules provided discharge as the punishment for a third violation.[79] As Delph had left the plant before Pedro prepared the form, the Company mailed it to him.

b. *Analysis and conclusions*

The Company's interest in Delph's union sentiment surfaced soon after the Union's meeting on February 16, when Robbie Mullins unlawfully interrogated him about whether he had attended it. Mullins rejected Delph's negative response, and insisted that he had in fact been at the meeting. In late March, a union letter, announcing Delph's membership in its shop committee, erased any doubt Pedro and Roy Almaroad may have had about Delph's attitude toward the Union.

Delph openly supported the Union's campaign at the plant. In April, he wore a Teamsters button at work, within Pedro's view. He also repeatedly handbilled outside the plant.

Here, as in other instances, I find it likely that Pedro was hostile toward Delph's open support for the Union. His willingness to resort to discipline as a weapon against union activists, and the timing of the correction notice of May 12, which Pedro authorized, provided strong support for the General Counsel's contention that Delph's union activity was a motivating factor in Pedro's decisions to take this adverse action.

The Company argued that Delph's body odor was its sole reason for the correction notice of May 12. Thus, according to the Company, union activity played no part in Pedro's and Almaroad's decision to discipline Delph on May 12. According to the Company, Pedro and Almaroad punished Delph pursuant to Pepsi-Cola's demand in February that the Company tighten up on its plant cleanliness and employee hygiene. The Company also called attention to its own personnel hygiene and practices regulations which it posted in the breakroom on February 25. There was no showing that the Company refrained from enforcing this policy against any other employee suffering from a body odor problem.

In further support of its position, the Company called attention to the verbal correction notice which Pedro issued to Delph on March 13. Noting that the General Counsel did not allege that this disciplinary action violated the Act, the Company pointed to Almaroad's subsequent efforts to help Delph overcome his body odor problem. These efforts showed that, regardless of his union activity, the Company was trying to retain Delph as an employee.

Despite those efforts, on May 12, Almaroad agreed with Pedro that Delph had an offensive body odor. In accordance with the Company's stated policy regarding a second violation of its personnel hygiene and practices rules, Almaroad laid Delph off for 3 days. In sum, I find that the Company has shown it would have taken this action even if Delph had abstained from supporting the Union. I shall, therefore, recommend dismissal of the allegation that this 3-day suspension violated Section 8(a)(3) and (1) of the Act.

On November 11, and 4 months later, on March 24, 1987, Delph engaged in conduct which Section 8(a)(4) and (1) of the Act protected. He testified on the General Counsel's behalf. In his testimony on March 24 and 25, 1987, Pedro admitted that Delph had angered him by testifying untruthfully.

On December 2 and 8, less than 1 month after he had testified in these proceedings on the General Counsel's behalf, the Company disciplined Delph. I have noted the timing of this punishment, Pedro's admission that Delph's testimony had angered him, and Pedro's previous use of correction notices, suspensions, and discharges in retaliation against employees, who had engaged in protected activity. I find that the General Counsel has made a prima facie showing that Delph's testimony was a motivating factor in the decision to discipline him on these two occasions.

The Company claimed that on December 1 and 2 Pedro had caught Delph loafing on the job. On the first occasion, Pedro had verbally reprimanded Delph. However, according to Pedro, when he found Delph loafing again on the very next day, he directed Almaroad to issue a warning to Delph for ''not performing his job.'' Almaroad did just that. He immediately issued a correction notice for ''Unsatisfactory Work Performance.'' In explanation of this charge against Delph, Almaroad wrote that he was ''not performing his work duties.''

The facts show that the Company's explanation of its motivation on December 2 was pretextual. For, when Pedro

[79] Where Delph's and Pedro's testimony conflicted regarding their encounter on May 1, 1987, I have credited the latter's more detailed testimony, which Bob Lee, Buddy Messer, Strawberry Hunnicutt, and Danny Ridings corroborated.

There was a sharp conflict in testimony regarding Delph's body odor on May 1, 1987. Pedro and the other company witnesses, including Jerry Hurd, testified that Delph had a disagreeable body odor on that date. The General Counsel's witnesses, John Baker and David Waddell, testified to the contrary. Baker and Waddell each testified that he detected no body odor when he was close to Delph on that date. However, I am persuaded that Baker and Waddell were not as sensitive to Delph's body odor, as were Pedro and the other company witnesses, who were paying more attention to the aroma. Also, Waddell and Baker were friendly to Delph and thus not likely to be frank about their perception of his body odor. Accordingly, I have credited Pedro, and the other company witnesses, regarding Delph's body odor on May 21, 1987.

came upon him, on that day, Delph had completed his assignment and had, as usual, looked for Almaroad to get a new assignment. Delph made a good-faith effort to find Almaroad, but failed. Delph returned to his workstation to wait for Almaroad. When Almaroad finally appeared at the palletizer, where Delph had been working, he did not complain that Delph had not performed his assignment. Instead, he offered to find another task for Delph. Pedro did not ask Almaroad anything about Delph's previous assignment. Instead, he announced his decision to write Delph up. Pedro was determined to punish Delph, and believed he had found a reason to do so. However, I find that Delph was not loafing. More important, I find that, contrary to the Company's correction notice, Delph had in fact performed his work duties.

The Company has failed to rebut the General Counsel's showing that Delph's testimony in these proceedings was a factor in Pedro's decision to issue the written warning to him on December 2. I find, therefore, that by issuing that warning, the Company violated Section 8(a)(4) and (1) of the Act.

I also find that the General Counsel did not make a prima facie showing that Delph's support for the Union was a motivating factor in the issuance of the warning of December 2. In arriving at this finding, I have considered the passage of 8 months after Delph's last show of active support for the proceedings on November 11. Pedro's anger at what he perceived to be false testimony, provoked him to punish Delph on December 2. Accordingly, I find that the warning of December 2 did not violate Section 8(a)(3) of the Act. I shall recommend dismissal of the allegation that it did.

As in the case of Sam Sanders, the Company contended that Delph's violation of its eye safety regulations motivated Pedro's decision to suspend him for the balance of the day, on December 8. However, for the reasons stated above, I find that the Company has not shown that, absent his testimony on the General Counsel's behalf, at the hearing before me on November 11, Pedro would have disciplined Delph for not wearing his safety glasses on December 8. I further find, therefore, that by issuing a correction notice, containing a warning and a 3-day suspension, to Delph on December 8, the Company violated Section 8(a)(4) and (1) of the Act.

Here, again, the General Counsel did not make a prima facie showing that on December 8, Delph's support for the Union was a motivating factor in Pedro's decision to suspend him. In arriving at this finding, I have considered both the passage of time since Delph's last show of support for the Union, and my finding that the General Counsel had not sustained her burden of showing that support for the Union was a motivating factor in Pedro's decision to suspend Delph on May 12. I shall recommend dismissal of the allegation that the Company violated Section 8(a)(3) of the Act by suspending Delph on December 8.

The Company's position was that it discharged Delph on the morning of May 21, 1987, only because he had an unpleasant body odor on that day, which constituted his third violation of its hygiene regulations. However, I have concluded that when Pedro perceived that Delph had a body odor that morning, he was glad to use it as a pretext for getting rid of him.

Over 1 year had elapsed since the Company had last disciplined Delph for having unpleasant body odor. In the meantime, in December, Almaroad had testified that Delph had his body odor under control. Thereafter, until this last incident, Delph had not given the Company cause to punish him for neglecting his problem. The Company's progressive discipline policy did not include any period of limitations. There was no provision in the Company's statements of policy for beginning the process anew if there was a 6-month or 1-year hiatus between violations of its personnel hygiene regulations. However, a reasonable approach to Delph's asserted lapse on the morning of May 21, 1987, would have been something less than discharge.

Pedro, as the Company's general manager, had the authority to use discretion. Indeed, he exercised such discretion on December 15, when he permitted Carlos Fields to continue working as a forklift driver, instead of sending him home for the balance of the day for failing to wear earplugs properly. On that occasion, Pedro decided that the Company's production needs required that he postpone Fields' partial day suspension. In Delph's case, Pedro was not anxious to retain him at all.

On the contrary, Pedro was in a hurry to get rid of Delph. Pedro, himself immediately prepared a separation of employment form for Delph. In filling out the form, Pedro asserted erroneously that Delph had suffered a 3-day suspension for ''poor hygiene body odor'' on ''5/12/87.'' I cannot infer that Pedro intentionally misdated that incident. However, I can infer that this error resulted from haste born of hostility. This same hostility surfaced on December 2 and 8, when, on each occasion, Pedro used a pretext to chastise Delph in violation of Section 8(a)(4) and (1) of the Act.

In sum, I find that Pedro seized upon his perception, and that of his witnesses, that Delph had a strong, disagreeable body odor, as a pretext for discharging him on May 21, 1987. The real reason was Delph's testimony at these proceedings, on November 11, and on March 24, 1987. Accordingly, I find that the Company thereby violated Section 8(a)(4) and (1) of the Act.

I have found that Pedro's enforcement of the Company's hygiene regulations against Delph in 1986 did not violate Section 8(a)(3) and (1) of the Act. In those instances, the Company satisfied me that Pedro would have acted as he did even if Delph had not been a union activist. Here again, I have concluded that union animus played no part in Pedro's decision to discharge Delph. Therefore, I shall recommend dismissal of the allegation that Delph's discharge violated Section 8(a)(3) of the Act.

14. Delph's and Sanders' layoff

a. *The facts*

Delph and Sanders went to work on the can line on January 6, 1987. Delph was operating the can palletizer and Sanders was operating the caser. Supervisor Robbie told them that after they finished running the can line, and left for lunch, they should not return to work until Monday, January 12. The Company had not warned them of this layoff and did not give an explanation to them. Of the seven employees working on the can line, the Company selected only Delph and Sanders for layoff.

Sanders asked Mullins for an explanation of this layoff. Mullins said he did not know why, but that Roy Almaroad told him to do it. Sanders punched out at about 11 a.m. He came back to work on the following Monday, January 12.

Delph also asked Mullins for a reason for his 3-day layoff. Mullins said he did not know. Delph clocked out at lunchtime. He returned to work on the following Monday.[80]

b. *Analysis and conclusions*

Looking at the selection of Sanders and Delph as the only employees for layoff on January 6, approximately 2 months after they had testified for the General Counsel, I find much to suggest that the Company punished them because of their testimony. Sanders testified for the General Counsel on November 7. Delph did likewise 4 days later. Pedro admitted that their testimony provoked his ire. I have also found above that Pedro's hostility toward their testimony caused him to inflict discriminatory punishment upon Sanders and Delph in other contexts. On January 6, the Company selected these same two, out of seven, for layoff, without warning, and without giving them an explanation, as they requested. These facts strongly suggested that the Company resorted to layoffs to punish Sanders and Delph for testifying in these proceedings.

The Company showed that on occasions in 1986, before and after Sanders and Delph became known to it as union activists, and soon after they had testified in these proceedings, they reported for work between 6 and 7 a.m., and for the day shortly after 11 a.m.. The Company also showed that occasionally it gave them 2-day workweeks. None of those incidents was alleged as an unfair labor practice.

However, I find that the Company's claim that there was no work available for Delph and Sanders for the remainder of the workweek, after lunch, on January 6, 1987, was without merit. According to Roy Almaroad, when the can line completed its production run, on that day, at about 11:15 a.m., the Company could only find work for five of its seven employees on that line. David Waddell did repair and maintenance on a high cone machine. Wilson Loudermilk sanitized and did repair and maintenance on the can filler. Shirley Stidham worked in the syrup room as a trainee. Cindy Wiles and Hester Fields were rewrapping cans. There was no showing that Waddell, Loudermilk, Wiles, or Fields had special skills or that Delph or Sanders could not perform the tasks, which those four employees performed, after the can line stopped on January 6, 1987.

I also find from Almaroad's testimony that prior to January 6, 1987, he found work for Delph, when the can line was not running. This was work in connection with a perimeter strip around the Norton plant building. It consisted of making preparation for the painting, putting down forms for pouring concrete ''or whatever''(Tr. 5467). Almaroad did not elaborate on the quoted language. However, the record showed that on December 8, Delph and Sanders were removing forms for concrete and cleaning up in connection with that same project. Almaroad admitted that the Company completed the project in ''late January, early February, right around in there''(ibid.). Yet, on January 6, for some reason, which neither Almaroad, Robbie Mullins, Pedro, nor the Company provided to Delph, Sanders, or to the record before me, Almaroad did not assign such work to them. Indeed, Almaroad, on direct examination, testifying in a frank and forthright manner, admitted that after January 6, he assigned such work to employees Hester Fields, Cindy Wiles, and Brian Almaroad. His testimony showed also the pressing need to complete such work[81] ''as quickly as we possibly could''(Tr. 5487–5488).

Immediately after Almaroad's admission showing the availability of work, and his assignment of such work to the three employees after January 6, the Company's counsel asked the following question:

> More specifically, on January the 6th, the day that you sent home Ernie [Delph] and Sam [Sanders], was there work available for them to do in construction, painting and all of that?

At this point, Almaroad seemed to tighten up a bit. He began to answer, hesitated briefly, and then quickened his pace. He responded to counsel's question as follows:

> We had—we had the painting at that time, I believe, pretty well wrapped up. As a matter of fact, I don't think the painters were even working at that time. I think they were already gone.

Counsel for the Company followed up with this question: ''All right. Was there anything else along those lines that they could have done?'' Almaroad continued to contradict his earlier testimony, with this answer: ''No, sir. We had the plant in good shape at that time.''

Finally, Almaroad attempted to erase the urgency which he testified to in his earlier testimony. He answered: ''No, sir.'' when the Company's counsel asked: ''Would you have any reason not to try to finish that project if you had something that needed to be done?''

Considering Almaroad's change in demeanor, and the consistency of his admission with his earlier testimony regarding his effort to find work for Delph, when the can line was not operating, I have rejected his effort to contradict that admission, which I have credited. I find, therefore, that the Company's proffered explanation for laying off Delph and Sanders on January 6, 1987, was pretextual. For, contrary to its claim, there was work available for them on and after that date.

The General Counsel's strong prima facie case stands unrebutted. Indeed, the Company's pretextual explanation buttressed the General Counsel's strong showing that Delph's and Sanders' testimony in these proceedings was the motivating factor in the Company's decision to lay them off on January 6, 1987.[82] I find, therefore, that by laying employees Delph and Sanders off from the middle of that day until they returned to work on January 12, 1987, the Company violated Section 8(a)(4) and (1) of the Act.

I also find that the General Counsel has not made a prima facie showing that their support for the Union was a motivating factor in the Company's decision to lay Delph and Sand-

[80] For the most part, I based my findings of fact regarding Delph's and Sanders' layoff on January 6, 1987, on their testimony. I found from Almaroad's testimony that seven employees, including Delph and Sanders, were working on the can line on the morning of January 6.

[81] According to Almaroad's credited testimony, ''we had the plant all tore to pieces. We had products setting everywhere and we had to get it back in its proper area so we were trying to get it done as quickly as we possibly could.''

[82] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). (''If [the ALJ] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive.'')

ers off on January 6. Approximately 10 months had elapsed since either Delph or Sanders had engaged in union activity. There was no showing that the Company had discriminated against either of them because of union activity during those 10 months. Instead, the record showed that their testimony on behalf of the General Counsel in these proceedings had motivated Pedro's earlier decisions to punish Delph and Sanders. Accordingly, I shall recommend dismissal of the allegations that the Company violated Section 8(a)(3) of the Act by laying Delph and Sanders off on January 6, 1987.

15. John Horne

a. *The facts*

From October 22, 1984, until July 25, the Company employed John Horne as a route salesman, servicing restaurants, swimming pools, and other facilities. He drove a company-owned Chevrolet van, delivering postmix, premix, carbon dioxide gas, and cups. Postmix is syrup, which Horne delivered in 5-gallon containers. Premix is soda already mixed, in 5- and 10-gallon containers. His route covered portions of southwestern Virginia, including Norton and nearby communities, and eastern Kentucky.[83]

Horne supported the Union. He signed a card for the Union on or about February 12. Early on a morning in February, Horne parked his route truck in back of company employee Gregory Stanley's delivery truck, in a shopping center, at Esserville, Virginia. Both were on the clock, working for the Company. Stanley was making a delivery of soda pop to a Food Lion supermarket. Horne's customers at the Esserville shopping center were Rax, a fast food restaurant, located 100 to 150 yards away from the Food Lion, and Rite-Aid, a drug store, next door to the supermarket.

Without leaving his truck, Horne called Stanley aside, and tried to convince him to sign a card for the Union. When Stanley finished expressing his disinterest in the Union, Horne drove off. The conversation took about 5 minutes. At the end of his workday, Stanley reported his encounter with Horne to Pedro.

In the same month, Horne approached company route driver Frank Colyer Sr., about the Union, while both were on the clock. Horne came upon Colyer, who was making a delivery to a Piggly-Wiggly supermarket, in Wise, Virginia, and asked him to sign a card for the Union. Colyer declined, and the two went on about their business. Horne's closest customer was Pizza Hut, located across the street, and about 150 yards from the supermarket. A few days later, Colyer told Huck about this encounter.

On February 23, Horne attended a union meeting and joined its plant organizing committee. On February 28, the Company received a union letter, listing Horne as a new member of its organizing committee. The Company posted the list, near the timeclock, at the Norton plant. On or about March 1, Horne, along with employees Ronnie Blanken, Bobbie Blanken, Larry Blanken, and Francisco Vega, handbilled for the Union, at the Company's Tazewell, Virginia warehouse. Horne handbilled with other employees, outside the Norton plant, two or three times, in March and April. On each occasion, Supervisor D. R. Robinson and Joseph (Huck) Hunnicutt observed the handbilling outside the Norton plant. In March, Horne and other employees, attired in work uniforms, distributed union buttons and bumper stickers outside the Norton plant, as Pedro watched. Horne put Teamsters bumper stickers on both of his vehicles, and wore a Teamsters button at work and on his days off. On March 20, Horne testified at a Board representation hearing concerning the Union.[84]

On February 25, as Horne was checking in his truck, D. R. Robinson told him that Pedro wanted to see him. When Horne presented himself in Pedro's office, he found Pedro and George Hunnicutt Sr. Pedro told Horne that he was on the clock too many hours, and that he had seen Horne wasting time on business other than the Company's. Further, Pedro said that Horne was not to conduct business other than the Company's while on the clock. Horne attempted to explain that Pedro's perception was erroneous. Pedro did not reply to Horne's explanation. Instead, he handed a correction notice to Horne.[85]

The correction notice gave improper conduct and unsatisfactory work performance as the reasons for its issuance. In explanation of those reasons, the correction notice stated that Horne had been ''observed more than once at locations other than those on [his] designated route, transacting business other than the Company's while [he was] on the time clock and the Company was paying you.'' The notice went on to explain that his working time had remained the same, while his sales had ''dropped drastically.'' The notice warned Horne ''not to work unless on the time clock.'' The notice concluded with the assertion that George Hunnicutt Sr. had verbally warned Horne about transacting business other than the Company's, during working time, while on the timeclock.

At page 12 of its brief to me, the Company construed Pedro's testimony to show that prior to February 25, when he was analyzing Horne's productivity, and when he decided to issue the correction notice, he knew of Horne's attempts to obtain Colyer's and Stanley's signatures on union cards. After reading Pedro's testimony that prior to February 25, he knew that Horne ''had been observed doing business other than the Company's, while he was on the Company's time,'' and noting Stanley's and Colyer's credited testimony, I agree, and so find.

Between March 1 and 20, Horne stopped at the Company's Harlan, Kentucky warehouse to wash his truck. Warehouse Supervisor Chris Morris approached Horne and asked how the Union was going. Horne replied that as far as he knew, it was ''going great.'' Morris responded with a warning that ''if it goes union, George is going to sell.''[86]

[83] I based my findings regarding Horne's employment upon his uncontradicted testimony.

[84] Except for the incidents involving employees Gregory Stanley and Frank Colyer Sr., I have credited Horne's testimony regarding his union activity. However, in contrast with Horne, who was evasive on cross- examination regarding their meeting in a shopping center, Stanley testified candidly. Accordingly, I have credited Stanley's recollection of the incident. Horne did not remember meeting with Colyer at a store in Wise, Virginia. Colyer presented a detailed recollection of such a meeting, in an impartial manner, which I have credited.

[85] I have credited Horne's testimony regarding his meeting of February 5, with Pedro.

[86] Morris admitted talking to Horne during the union campaign. However, according to Morris, Horne initiated the conversation, and Morris answered that he could not say anything about the Union. Morris did not deny telling Horne that George Hunnicutt would sell the business if the union campaign

Continued

Later, on the same day, in Cumberland, Kentucky, Sales Supervisor Jimmy Stipes met up with Horne on the latter's route and asked how the Union was going. Horne answered that he thought that it was ''coming along great.'' Horne said he understood that Stipes had to take a certain position on the Union because he was a supervisor. He also urged Stipes to consider the employees' position because they had been cheated on their paychecks.[87]

As Horne was leaving the Company's Norton plant after work on April 29, he encountered Huck Hunnicutt. After Horne said something about needing premix on his route, Huck talked about the Union, suggesting in substance that the Union had abandoned its supporters among the Company's employees. Horne parried Huck's suggestion, saying ''they might have went home but they've not left.''

Horne returned to the need for premix on his route. Hunnicutt said that one of the Company's customers had complained that Horne had delivered a half empty tank of Diet Pepsi. Horne denied delivering a half empty tank. Huck replied that he intended to check on the complaint, and if it were true, he would ''kick [Horne's] fucking ass and then fire [Horne] cause then, I'll have good grounds.'' Huck said that Horne ''could go ahead and organize [the] union . . . But not to fuck with [Huck's] business.[88]

On July 25, Pedro discharged Horne for poor work and willful misconduct. The separation of employment form, which the Company prepared, explained the reasons for Horne's discharge, as follows:

> On 7/22/86, you were told by Mr. Green of the Job Corps that they were going to replace Pepsi with Coke. You did not report this. The Company found out by accident and is trying to save the account. YOU WERE PREVIOUSLY WARNED ABOUT THIS SAME CONDUCT. YOU HAVE ALSO BEEN WARNED TWICE ABOUT FAILURE TO PROPERLY SERVICE ACCOUNTS. YOU ARE DISCHARGED FOR FAILING TO REPORT COMPETITIVE SITUATIONS LIKELY TO RESULT IN LOSS OF BUSINESS IF COMPETITION NOT MET.

b. *Analysis and conclusions*

The General Counsel urged that on February 25 the Company issued a correction notice containing a warning to Horne, because of his union activity. The Company contended that union activity had nothing to do with the issuance of that correction notice. I agree with the General Counsel's position.

The correction notice, which Pedro issued on February 25, addressed itself to Horne's ''transacting business other than the Company's while [he] was on the time clock.'' The notice also pointed out that Horne had engaged in such business ''at locations other than those on [his] designated route.'' As he handed the correction notice to Horne, Pedro instructed him to refrain from conducting ''business other than the Company's while on the clock.'' The record made clear that the ''business'' Pedro referred to in the correction notice was Horne's solicitations of employees Stanley and Colyer, on the Union's behalf.

Pedro's attempt to squelch Horne's solicitation on the Union's behalf was a departure from the Company's policy toward employee solicitation. There was no showing that the Company maintained any no-solicitation rule either at its facilities or on its truck routes. Instead, I find from Supervisor Jerry Ryan's testimony that the Company has permitted employees to solicit freely, while on the clock and working. Such solicitations pertained to the sale of items such as used automobiles and cookies. Thus, unless the Company showed that Horne's solicitation interfered with its business operations, Pedro could not lawfully discipline him for engaging in solicitation of fellow employees on the Union's behalf. *Harry M. Stevens Services*, 277 NLRB 276, 282 (1985).

Pedro sought to avoid a finding that the correction notice violated Section 8(a)(3) and (1) of the Act, by asserting on the notice, and in his testimony, that at the time Horne was engaged in the Union's business, he was not on his designated route, and thus interfering with the Company's operations. However, this tactic fell short of the mark.

According to Pedro, since July 6, 1983, the Company has had a policy prohibiting its truckdrivers from operating its vehicles off their designated routes. Pedro also testified that the Company posted this rule on a wall near the drivers' check-in room at the Norton plant. The rule itself, and Pedro's testimony, show that its purpose was to stop gross departures from designated routes. The rule mentioned that some drivers had left their routes to ''stop by their homes, in other cases for reasons unknown.'' Pedro mentioned an incident in which a driver visited his girlfriend ''on his way to his route.'' (Tr. 4839.)

Horne was not off of his designated route when he solicited Stanley's and Colyer's support for the Union. When Horne stopped to talk to Stanley, they were in a shopping center, which was on Horne's route. Again, when Horne solicited Colyer's support for the Union, they were about 150 yards from a Pizza Hut, which Horne served as part of his route, and which was located on the same street on which they met. In neither instance did Horne violate the Company's rule. Moreover, the Company did not show that Horne's union activity interfered with its deliveries on the days on which he solicited Stanley and Colyer. Thus, I find that Pedro used the prohibition against off-route driving as part of his scheme to punish Horne for soliciting support for the Union from company employees. I also find that by issuing

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succeeded. Counsel did not ask Morris if he had made such a remark to Horne.

Morris' testimony showed that he was less than neutral toward the Union's organizing campaign. He admitted that after he heard Horne talk about the Union to one or two of the Company's Harlan employees, he told Horne he should not be engaging in such conduct instead of attending to the Company's business. Morris reported Horne's conduct to George Hunnicutt Sr. Finally, Morris admitted that when the Harlan employees asked him if George Hunnicutt intended to close the Harlan facility if the Union won, he answered no, but added that Hunnicutt Sr. would close their warehouse, if it did not show a profit.

I found, above, Morris reluctant to provide detailed testimony about which of his employees he spoke to about the Union. Here, I noted that he monitored Horne's union activity at the Harlan warehouse, discouraged it, and reported it to George Hunnicutt Sr. Thus, did Morris reveal his hostility toward Horne's support for the Union. These factors, together with Horne's unaffected attitude, as he testified about this encounter, caused me to credit his testimony, where it differed with Morris'.

[87] Stipes did not deny making the remarks which Horne attributed to him. As Horne testified about this incident in a frank manner, I have credited his testimony in this regard.

[88] I based my findings regarding the incident of April 29 on Horne's uncontradicted testimony.

the correction notice of February 25, in the effectuation of this scheme, the Company violated Section 8(a)(3) and (1) of the Act. *Harry M. Stevens*, supra at 282–283.

The General Counsel contended that the Company violated Section 8(a)(1) of the Act when Supervisors Morris and Stipes interrogated Horne about the Union, when Morris warned Horne that George Hunnicutt Sr. would sell the business if the Union's organizing campaign succeeded, and when Huck warned Horne on April 29. The Company urged dismissal of these allegations on the ground that the conduct attributed to Morris, Stipes, and Huck did not impair its employees' right under Section 7 of the Act to ''join or assist'' the Union.

I find that when Supervisors Morris and Stipes asked how the Union was going, they were attempting to find out if Horne was continuing to support the Union. In light of the Company's resort to discriminatory discharges and other reprisals against employees who supported the Union, I find that Morris' and Stipes' question was likely to interfere with, restrain, and coerce Horne in the exercise of his right under Section 7 of the Act to engage in union activity. Accordingly, I find that the Company violated Section 8(a)(1) of the Act when Morris and Stipes interrogated Horne.

Morris added to the coerciveness of his question by his remark that ''if it goes union, George is going to sell.'' Such an assertion by a supervisor is likely to raise the spectre of the loss of jobs and other adverse effects which may follow in the wake of the transfer of a going business to a new owner. Thus, I find that Morris' remark was likely to interfere with employee rights under the Act to support and adhere to a union. I also find, therefore, that by Morris' remark, the Company violated Section 8(a)(1) of the Act. *Williams Motor Transfer*, 284 NLRB 1496 (1987).

Turning to Huck Hunnicutt's remarks to Horne, when they met on April 29, I find merit in the General Counsel's allegation that they violated the Act. Huck's remarks included two messages reflecting strong hostility toward Horne. The first was a threat that Huck would physically attack Horne, using a misdelivery as an excuse for the assault. The second was a warning that Huck was looking for an excuse to discharge him. Horne was free to engage in union activity, but woe unto him if he erred in his work. Huck's references to the Union and Horne's union activity, strongly suggested the real motive for the threats. I find that that Huck's remarks were coercive and were likely to interfere with and restrain Horne in the exercise of his right under Section 7 of the Act to engage in union activity. I also find that by Huck's unlawful conduct, the Company violated Section 8(a)(1) of the Act.

The General Counsel has shown that Horne's union activity annoyed the Company sufficiently to provoke it to discriminate against him by issuing a warning to him on February 25. In addition, I have found that 2 months later, Huck showed that the Company's management remained hostile to Horne because of his union activity. Indeed, Huck warned that he was looking for an excuse to discharge Horne. Thus, there was a prima facie showing that Horne's support for the Union was a factor in Pedro's decision to discharge Horne 3 months after Huck had voiced his warning.

Pedro testified that he discharged Horne for failing to notify the Company that one of its customers, the Job Corps facility at Coeburn, Virginia, intended to switch from Pepsi-Cola to Coca-Cola. I find that the Company has shown that Pedro would have made the same decision even if Horne had not been a union supporter.

I find from Pedro's testimony that on April 7 he issued a correction notice to Horne for failing to warn the Company that one of its customers, the Bread and Chicken House, a restaurant in Big Stone Gap, Virginia, was on the verge of switching from Pepsi-Cola to Coca-Cola. Pedro included in the correction notice, a warning that: ''REPEAT OF THIS INFRACTION WILL RESULT IN DISCHARGE.'' The General Counsel has not alleged that this warning was violative of the Act.

Horne did not heed Pedro's warning. On July 22, Charles Greene, a Job Corps official, told Horne that because Coca-Cola had offered to sell at a lower price, the Coeburn facility intended to stop doing business with the Company. I find from the Company's records, that on the same day, Horne clocked out at 5:15 p.m.; that he worked on the following day, from 7 a.m. until 6:30 p.m., and had a day off on Thursday, July 24. It was not until July 25, that Horne reported that the Job Corps had received a better offer from Coca-Cola. However, by the time Horne made his report to his supervisor, Bob Lee, Lee had already spoken to the Job Corps' Greene and had learned of the possible loss of this large customer. Greene had also told Lee of his remarks to Horne. By the time Horne reported to Lee, on July 25, Lee had advised Pedro of Horne's negligence.[89]

Upon receiving Lee's report, Pedro had a valid ground for terminating Horne. Pedro had warned Horne on April 7 that if he again failed to report the possible loss of a customer ''this infraction will result in discharge.'' The General Counsel did not allege that this warning was unlawful. Nor did she contend that any of the three subsequent correction notices, which Pedro issued to Horne in June and July, violated the Act. Each of the last three correction notices reported a failure to service an account properly. Pedro did not look to these correction notices as reasons for his decision on July 25. Instead, Pedro recalled his warning of April 7, reasonably saw the Peace Corps incident as a repetition of the infraction which had provoked him on that occasion, and carried it out. There was no showing that Pedro had ever relented in a similar situation. Indeed, there was no showing that a similar situation had ever confronted Pedro. However, in light of Pedro's warning on April 7, I have no doubt that Pedro would have discharged Horne for the second infraction even if that employee had not been a union supporter.

I have no doubt that Pedro was unhappy about Horne's union activity, and might well have been seeking an excuse to get rid of him. However, as the Board recognized in *Klate Holt Co*., 161 NLRB 1606, 1612 (1966):

> If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for

[89] According to Horne, he did not work on July 23, but came back to work on July 24. His timecard showed that he worked on July 23 and was absent from work on July 24. However, in making my findings regarding when Horne worked during the week of July 21, I have relied upon the Company's timecards which it maintained in the ordinary course of business, rather than Horne's less reliable recollection.

I based the remainder of my findings of fact regarding the Company's explanation of Pedro's decision to discharge Horne, upon a composite of Greene's, Lee's, Horne's, and Pedro's testimony. I found it unnecessary to resolve issues of credibility regarding Pedro's remarks during his final confrontation with Horne.

which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

Thus, even if Pedro were glad to be rid of a union supporter on July 25, I cannot find that union activity was a motivating factor in his decision to discharge Horne. Accordingly, I find that the General Counsel has not shown by a preponderance of the evidence that the Company discriminatorily discharged Horne. I shall, therefore, recommend dismissal of the allegations that Horne's discharge violated Section 8(a)(3) and (1) of the Act.

16. Reduction of the mechanics' working hours

a. *The facts*

In 1985 and 1986, the Company employed Bobby Blanken, Ronald Blanken, Kenneth Blanken, and Richard Shular as full-time truck mechanics at its Norton plant. In 1986, employee Gary Sturgill, who worked at the Norton plant mainly as a forklift mechanic, performed truck maintenance only in emergencies. During the 2 years, Fleet Manager Elmo Wiles supervised the Company's truck mechanics.

Two of the mechanics, Bobby and Ronald Blanken, were active union supporters. In mid-February they attended a union meeting, and solicited employee signatures on its cards. In its letter to the Company, dated February 18, which the Company received on February 21, the Union announced that Bobby and Ronald had joined the plant organizing committee. In his antiunion letter to the Company's employees, dated February 22, George Hunnicutt Sr. listed Bobby and Ronald among the employees helping to ''push and peddle union propaganda.''

On February 23, Bobby and Ronald attended a union meeting, where they discussed their entitlement to overtime with a union attorney. Bobby stated that they had not received any overtime during their employment by the Company. The Company paid them straight time for hours they worked in excess of 40 hours per week. The attorney said he would look into the matter, and discuss it with them at the next union meeting.[90]

In February, Fleet Manager Elmo Wiles heard a rumor that the mechanics were seeking back overtime wages in a law suit against the Company. Wiles also overheard a conversation between his daughter and her husband, mechanic Richard Shular, regarding Ronald Blanken's conversation with an attorney at a union meeting about recovering overtime for the mechanics. Wiles' daughter reminded Shular that her father had told him that the mechanics were not entitled to overtime.

In the same month, soon after hearing the rumor and the conversation, Wiles told George Hunnicutt Sr. about them. Wiles told Hunnicutt about Ronald Blanken's conversation with the attorney at a union meeting.[91]

When George Hunnicutt Sr. heard Wiles' story, his response was: ''[t]hey'll just have to sue me.'' Hunnicutt also asked Wiles which employees were bringing the action against the Company. Wiles told him it was the mechanics. In Hunnicutt's opinion, the employees bringing the action were not entitled to overtime, and would be wasting their money. Hunnicutt said he wanted to talk to them and avoid losing his own money.[92]

In early March, at the next union meeting, the union attorney talked to Bobby and Ronald about their hours of work. The attorney said he would talk to them about their overtime again. The two Blankens never saw him again.

During the first or second week in March, George Hunnicutt Sr. invited Ronnie Blanken to his office. Hunnicutt began telling Blanken that he occasionally liked to talk to his employees. Continuing, Hunnicutt reviewed the names and job assignments of the mechanics. Hunnicutt said he understood that Blanken and his fellow mechanics had hired an attorney to check into their back overtime. It was Hunnicutt's view that the employees were wasting their money. After Hunnicutt mentioned something about interstate commerce, the conversation ended.[93]

On March 3, Fleet Manager Wiles told the Norton mechanics that their weekly hours were immediately reduced to 40. Prior to Wiles' announcement, the mechanics had worked as many as 50 or 60 hours per week, to keep the Company's trucks operating. Wiles did not provide any explanation for the reduction in hours. Nor did he divulge the identity of the company officer who had ordered the cutback in hours. Thereafter, until the week ending July 19, the Norton mechanics, including Shular, suffered substantial cutbacks in working hours.

During most of period between March 3 and July 19, the three Blanken brothers rarely worked more than 40 hours per week. Pedro's compilations and Shular's testimony showed that in January and February, Shular had three 2-week pay period in which his total working hours per period ranged from 95.5 to 121.5 hours. After Wiles' announcement, Shular's 2-week work records did not exceed 93 hours until the 2-week period ending on July 19.[94]

b. *Analysis and conclusions*

The complaint alleged that on March 3, the Company violated Section 8(a)(3) and (1) of the Act, by reducing the working hours of its mechanics in retaliation for their support for the Union and their union activity. The complaint named the three Blanken brothers, Bobby, Ronald, and Kenneth, Richard Shular, and Gary Sturgill as the mechanics who suffered the reduction in hours. However, I found from Elmo Wiles' testimony that Sturgill was not a truck mechanic at the time of the alleged discrimination. Therefore, I have not

[90] The facts regarding the mechanics' employment and union activity are undisputed.

[91] I based my findings regarding Wiles' knowledge of the rumor, the conversation between his daughter and her husband, and Wiles' report to George Hunnicutt Sr. on Wiles' uncontradicted testimony.

[92] I based my findings regarding Wiles' conversation with George Hunnicutt Sr. on Wiles' uncontradicted testimony.

[93] I based my findings regarding Ronald Blanken's meeting with George Hunnicutt on Blanken's uncontradicted testimony.

[94] I based my findings regarding the Company's reduction of the mechanics' working hours upon Elmo Wiles' admission that on George Hunnicutt Sr.'s instructions, he tried to limit the Norton mechanics to about 40 hours per week, Shular's and Ronald Blanken's testimony that Wiles announced the reduction on March 3, and Pedro's compilations of the Company's records. I have also credited Shular's and Ronald Blanken's testimony comparing their weekly working hours before and after March 3, only to the extent that Pedro's compilations corroborated it.

included him in my consideration of the merits of the General Counsel's contention regarding the alleged unlawful reduction in working hours. The Company denied the allegation, and argued that such reduction of hours as may have occurred among its truck mechanics after March 3, was not due to any unlawful design aimed at punishing union supporters. Contrary to the Company, I find for the reasons stated below that George Hunnicutt Sr. reduced the four truck mechanics' hours because Bobby and Ronald Blanken were assisting the Union, and further, because Ronald had attended union meetings and had sought the Union's help against the Company.

The General Counsel has made a prima facie showing that George Hunnicutt Sr.'s hostility to the Union was a motivating factor in the Company's decision to reduce the working hours of its truck mechanics on and after March 3. By February 21, Hunnicutt Sr. knew from a union letter that Ronald and Bobby Blanken had signed cards for the Union and were actively supporting its organizing campaign at the Norton plant. Soon after, in late February, Hunnicutt Sr. learned from Fleet Manager Elmo Wiles, that Ronald Blanken had attended a union meeting, and had obtained the Union's promise to help the mechanics collect back overtime pay from the Company.

I find it likely that George Hunnicutt Sr. was irked when informed of Bobby and Ronald Blanken's union activity. I also find it likely that Hunnicutt Sr.'s temper increased when he learned of Ronald Blanken's discussion with a union attorney. Hunnicutt Sr.'s dealings with employee Vivian Rasnake on February 24, showed the likelihood that Bobby and Ronald Blanken had rooked him. For on that occasion he showed his union animus and violated the Act, when he equated disloyalty with support for the Union, and threatened her with an economic reprisal if she continued to adhere to the Union. A more vivid manifestation of Hunnicutt Sr.'s hostility toward union adherents occurred in July, when he unlawfully threatened employee Bobby Boyd with his cane because Boyd supported the Union.

Its own records, the credited testimony of Ronald Blanken and Richard Shular, And Elmo Wiles' admissions show that from March 3 until mid-July the Company imposed a substantially reduced work schedule on its Norton truck mechanics. The timing of this adverse action so soon after George Hunnicutt Sr. had learned of Ronald Blanken's meeting with the Union's lawyer provided the final element in the General Counsel's strong showing that it was a reprisal for union activity and adherence to the Union.

The Company argued that whatever reduction in hours occurred after March was due to the completion of its retrofitting and other mechanical work on a group of trucks it had obtained late in 1985 to upgrade its fleet. However, I find from Elmo Wiles' testimony that the work on those trucks did not reach completion until August or September.

Beginning in late March, the Company, for the first time, began diverting work from the Norton mechanics to Tim Brock, a local machine shop operator. This work included the rebuilding of a company truck engine, and a welder. During April, Brock assisted Shular in making a road service call to the Company's Harlan, Kentucky warehouse to remount an air compressor and install a radiator hose on a company truck. Normally, another Norton mechanic would have gone with Shular. The Company's records showed that in the spring and summer it contracted out some of its truck repair work, instead of assigning it to the Norton mechanics. Though the volume of diversion was modest, it showed that the Company was depriving its Norton mechanics of opportunities to enhance their wages. The Company did not bother to explain these departures from its normal business practice.

In a further effort to obscure the real reason for depriving its Norton mechanics of work, Elmo Wiles testified that the cutback was ''an economic move.'' Continuing, he testified that he ''had promised to have the operating costs down.'' His further testimony was that he did not see any need to perform unnecessary truck maintenance. However, on cross-examination, Wiles disclaimed authorship of the cutback. He admitted that George Hunnicutt Sr. directed him to reduce the Norton mechanics' work to ''about forty hours a week if we could.'' Wiles ''relayed this message to the men.'' Wiles admitted that he received this direction after he had told Hunnicutt Sr. about Ronald Blanken's rumored effort to recover back overtime pay from the Company. Hunnicutt Sr. did not testify about the motive for the cutback.

The Company's proffered explanatiOn for the sudden and unheralded cutback in the working hours of its Norton truck mechanics lacked substance. Thus, the Company did not rebut the General Counsel's showing that George Hunnicutt Sr.'s antiunion sentiment motivated his decision to reduce the working hours of Richard Shular, Bobby Blanken, Ronald Blanken, and Kenneth Blanken, after he had learned of Ronald's meeting with the union attorney and the possibility that the mechanics would ally themselves with the Union. I find, therefore, that by inflicting this economic reprisal on these employees, George Hunnicutt Sr. and the Company violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their union membership, activities or sympathies, threatening employees with unspecified reprisals because of their union membership, activities or sympathies, creating an impression that their union activities were under its surveillance, suggesting that employees who support a union are disloyal, soliciting employees to revoke their union authorization cards, installing television cameras and monitor recorders to keep its employees' union activity under surveillance, threatening employees with discharge for distributing union badges to other employees, promulgating a new rule concerning its employees' right to wear uniforms, threatening employees with discharge for handbilling, or otherwise assisting the Union, threatening employees with physical violence and discharge because of their union membership, activities or sympathies, interrogating employees regarding whether they signed authoriation cards for the Union, threatening employees with discharge if they signed authorization cards for the Union, ordering employees to remove union insignia from their clothing, threatening employees with plant closure if they selected the Union as their collective-bargaining representative, promulgating an overly broad proscription of employee solicitation on company time, and by prohibiting an employee from discussing with fellow employees any aspect of their employment by the Company, including wages, hours, conditions of employment, and possible advantages afforded to employees by collective bargaining, the Company engaged in unfair labor practices affecting

commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Company violated Section 8(a)(3) and (1) of the Act by:

(a) Issuing warnings on April 3 and May 19, respectively, to Bobby Boyd, suspending Bobby Boyd on May 15, and discharging him on July 3.

(b) Constructively discharging Johnny Waddell on July 24.

(c) Discharging Terry Henderson on February 21, and then converting the discharge to a 3-day suspension and a warning on February 24.

(d) Laying off Carlos Fields on March 3 for 2 days, March 4 and 5.

(e) Suspending Kenneth Allen for 3 days on March 9 and again on April 9 for 3 days.

(f) Issuing a written warning to Larry Blanken on February 24 and discharging him on March 5.

(g) Issuing a written warning to Bobby Blanken on March 7.

(h) Issuing warnings to Robert Falin on April 3 and on May 19, respectively, and suspending Falin for 3 days beginning on May 20.

(i) Imposing an excessive suspension on Francisco Vega on March 27, suspending him on June 24, for a fraction of a day, issuing written warnings to him on April 4, and on June 25, and by discharging him on August 18.

(j) Reducing the working hours of employees Richard Shular, Bobby Blanken, Ronald Blanken, and Kenneth Blanken on March 3.

3. The Company violated Section 8(a)(4) and (1) of the Act by:

(a) Issuing a written warning and a 3-day suspension to Sam Sanders on December 8.

(b) Issuing a verbal warning on December 16 and a written warning on December 24 to Sam Sanders, and by suspending him for 1 day on December 24.

(c) Discharging Sam Sanders on January 26, 1987.

(d) Issuing a written warnings to Ernest E. Delph on December 2 and 8, respectively, suspending him for 1 day on December 8, and discharging him on May 21, 1987.

(e) Laying off Sam Sanders and Ernest E. Delph on January 6, 1987, for 3 days.

4. The Company did not violate Section 8(a)(3) and (1) of the Act by:

(a) Changing the working hours of Bobby Boyd and Johnny Waddell.

(b) Discharging Jeff Ritchie.

(c) Issuing a written warning to Francisco Vega on July 3.

(d) Issuing warnings to Sam Sanders on July 17 and December 8 and 24, respectively; suspending him for 3 days on December 8, and for 1 day on December 24; and, discharging him on January 26, 1987.

(e) Issuing a warning and a 3-day suspension to Ernest E. Delph on May 12; a warning to him on December 2; a warning and 1-day suspension to him on December 8: and by discharging him on May 21, 1987.

(f) Laying Sanders and Delph off on January 6, 1987.

(g) Discharging John Horne on July 25.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In the same manner, I shall also recommend that the Respondent make whole those employees, named above, who it discriminatorily suspended, or laid off, or whose working hours it reduced discriminatorily.

I shall also recommend that Respondent be required to remove from its files any references to the warnings, verbal or written, suspensions, or discharges, which I have found violative of the Act, as set forth above, and notify the employees, who were thus disciplined, in writing, that it has done so and that it will not use these warnings, suspensions, or discharges against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[95]

ORDER

The Respondent, Pepsi Cola Bottling Company, Inc. of Norton, Norton, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing verbal or written warnings, reducing work hours, suspending, laying off, discharging or otherwise discriminating against any employee for actively assisting or supporting Teamsters Local Union No. 549, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters Local 549) or any other union.

(b) Issuing written warnings, suspending, laying off, discharging or otherwise discriminating against employees because they appear and give testimony at a National Labor Relations Board hearing.

(c) Threatening employees with a production shutdown, plant closure, discharge, acts of physical violence, or other specified or unspecified reprisals because they signed authorization cards for, are members of, handbill for, or otherwise assist or support Teamsters Local 549, or any other union.

(d) Coercively interrogating employees regarding their union activities, membership or sympathies, including whether they signed cards for Teamsters Local 549, or any other union.

(e) Engaging in surveillance of its employees' union activities, using television cameras, monitor devices, or any other means.

(f) Creating the impression that its employees' union activities and other concerted activities are under its surveillance.

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Promulgating rules concerning its employees right to wear uniforms, to curtail their union activity.

(h) Disciplining employees for discussing their employment status, or their wages, hours, and conditions of employment, or the possible advantages of collective bargaining and union representation.

(i) Requiring employees to remove from their clothing insignia pertaining to Teamsters Local 549, or to any other union.

(j) Telling employees that they were disloyal if they supported Teamsters Local 549, or any other union.

(k) Soliciting employees to revoke their signed union authorization cards supporting Teamsters Local 549, or any other union.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bobby Boyd, Johnny Waddell, Francisco Vega, Sam Sanders, Ernest E. Delph, Jeff Ritchie, and John Horne immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Make whole Bobby Boyd, Terry Henderson, Carlos Fields, Kenneth Allen, Robert Falin, Francisco Vega, Richard Shular, Bobby Blanken, Ronald Blanken, Kenneth Blanken, Sam Sanders, Ernest E. Delph, and Larry Blanken for any loss of pay they may suffered as result of the discriminatory reductions in their work hours, suspensions, or layoffs, in the manner set forth in the remedy section of the decision plus interest.

(c) Remove from its files any references to the unlawful discharges, suspensions and warnings, verbal or written and notify the employees in writing that this has been done and that the discharges, suspensions, and warnings will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its plant and warehouse at Norton, Virginia, and at its distribution centers at Maxwell, Virginia; Tazewell County, Kene Mountain, Virginia; Loyall, Kentucky; and at Bristol, Tennessee, copies of the attached notice marked ''Appendix.''[96] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[96] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''